Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FRANCIS X. BURNS; LAURA BURNS; LOIS A. BURNS; GEORGE M. DE PERSIA, SHARON M. DE PERSIA, HUSBAND AND WIFE; ESTATE OF JOHN T. MIELE; SENTA M. SHERIDAN; FOR THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners

V.

PNC BANK NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO FIRST EASTERN BANK; BANKSHARES REALTY COMPANY, SUCCESSOR TO FIRST EASTERN CORP.

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a putative class action, brought by property owners (the Petitioners) in a real estate development, near Hazleton, Pennsylvania, under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, against, *inter alia*, the developer's financiers (Respondents). The Petitioners filed an unopposed motion to supplement the complaint which alleged continuing injuries by class members from the Respondents' RICO predicate acts, within the limitations period. The Court of Appeals for the Third Circuit, however: (a) affirmed the district court's denial of the Petitioners' motion to supplement the complaint based on a finding that all of the civil RICO claims accrued when "storm warnings" of the Respondents' fraudulent conduct first appeared, even though subsequent, continuing injuries and predicate acts occurred within the limitations period, and the Respondents concealed their wrongdoing; and (b) affirmed the decertification of the class action, holding that an individualized statute of limitations defense bars class certification. The following issues are presented by this petition, as to which the courts of appeal are in conflict:

1. Is civil RICO subject to a "separate accrual" rule whereby a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury?

2. What constitutes "discovery" of injury to trigger accrual of the civil RICO statute of limitations?

3. What acts are sufficient to invoke the fraudulent concealment, statute of limitations tolling doctrine?

4. Does an individualized statute of limitations defense necessarily bar class certification pursuant to Fed. R. Civ. P. 23?

LIST OF PARTIES

Petitioners (plaintiffs-appellants below) are as follows: Francis X. Burns; Laura Burns; Lois A. Burns; George M. De Persia, Sharon M. De Persia, Husband and Wife; Estate of John T. Miele; and Senta M. Sheridan, for themselves and on behalf of all others similarly situated. The Petitioners are seeking re-certification of the class action in order to represent all others similarly situated. Other plaintiffs-appellants below who have not joined this petition are as follows: Leon R. Dongelewicz, Margaret J. Dongelewicz, Husband and Wife; John B. Knox, Betsy C. Knox, Husband and Wife; Frank J. Rachubinski, Helen A. Rachubinski, Husband and Wife; Ger D.J. Smit; Waclaw Szczesniak, Danuta Szczesniak, Husband and Wife.

Respondents (defendants-appellees below) are: PNC Bank, National Association, Successor by Merger to First Eastern Bank; Bankshares Realty Company, Successor to First Eastern Corp. Other defendants below, who it is believed have no interest in the outcome of this petition since they have been dismissed or otherwise settled with Petitioners, are as follows: Frank M. Cedrone; C.B.G. Limited, A Pennsylvania Limited Partnership; Oneida Water Company, A Company Organized Under the Laws of Pennsylvania; Valley Utilities Company, Inc., A Pennsylvania Corporation; MLA Management Association, A Pennsylvania Corporation; Ralph Conte; Arlene Reiness; The Property Owners Association of the Valley Of Lakes, An Unincorporated Association.

CORPORATE DISCLOSURE STATEMENT

The Petitioners are all individuals, i.e., none is a nongovernmental corporation. However, in the event that this case is re-certified as a class action, some nongovernmental corporations could become class members (these are banks which obtained property in the development), as follows:

Bank of America, N.A., believed to be successor holding company of Hazleton National Bank, Broad & Laurel Streets, Hazleton, PA 18201;

M&T Bank Corporation, successor holding company of Penna National Bank & Trust Co., 1 S Centre St., Pottsville, PA 17901;

Mellon Financial Corporation, parent of Mellon Bank, c/o Becker & Becker, 123 Overlook Ter., Bloomfiled, NJ 07003; and

Northwest Bancorp Inc., as parent of Northwest Savings Bank N.A., 2 Liberty St., Warren, PA 16365.

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I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER CIVIL RICO IS SUBJECT TO A "SEPARATE ACCRUAL" RULE. 12

A. The Third Circuit has split with the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which apply the separate accrual rule in civil RICO, statute of limitations. 12

B. The issue of separate accrual is important and recurring because, as the Second Circuit recognized: "Multiple injuries, spread over time, frequently result from the very nature of a RICO violation." 13

C. The decision below is wrong because the separate accrual rule is compelled by, *inter alia*, the plain meaning of 18 U.S.C. § 1964(c), the Clayton Act's statute of limitations jurisprudence, and to avoid granting prescriptive rights to RICO violators. 14

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHAT CONSTITUTES "DISCOVERY" OF INJURIES TO TRIGGER ACCRUAL OF THE CIVIL RICO STATUTE OF LIMITATIONS. 17

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B. The issue of what constitutes "discovery" to trigger accrual in civil RICO is important and recurring because it is present in all civil RICO cases where the statute of limitations defense is asserted. 20

C. The decision below is wrong because, *inter alia*, under the injury discovery rule, civil RICO claims only accrue when plaintiffs should have discovered their injuries, not the defendants' wrongful conduct, and irrespective of whether the particular plaintiff actually investigated "storm warnings". 21

III. REVIEW IS WARRANTED BECAUSE THE THIRD CIRCUIT'S "ACTIVE MISLEADING" RULE FOR FRAUDULENT CONCEALMENT DIRECTLY CONFLICTS WITH THE SUPREME COURT'S *HOLMBERG* PRECEDENT, AND OTHER CIRCUITS. 23

A. There is a conflict in the circuits regarding the elements of fraudulent concealment. 24

B. The issue is important and recurring because fraudulent concealment is a critical element in adjudicating the statute of limitations in civil RICO in the wake of *Rotella*. 25

C. The decision below is wrong because, *inter alia*, the Third Circuit's "active misleading" rule for fraudulent concealment directly conflicts with the Supreme Court's *Holmberg* precedent. 25

IV. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER AN INDIVIDUALIZED STATUTE OF LIMITATIONS DEFENSE BARS CLASS CERTIFICATION. 26

A. There is a conflict in the circuits regarding whether an individualized statute of limitations defense bars class certification. 27

B. The issue is important and recurring because it is present whenever the statute of limitations defense is asserted in putative class actions, pursuant to Fed. R. Civ. P. 23. 28

C. The decision below is wrong because, *inter alia*: the appropriate remedy to solve any individualized issues would have been redefinition of the class period. 29

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 23, 2004 (App., *infra*, 78a-80a), and a timely petition for rehearing was denied on August 19, 2004 (App., *infra*, 76a-77a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutes and rules are set forth in Appendix G (App., *infra*, 81a-90a): 15 U.S.C. § 15b (4-year statute of limitations for Clayton Act actions held to apply to civil RICO claims in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987)); 18 U.S.C. § 1964(c) (RICO provision which accords civil cause of action to "[a]ny person injured in his business or property by reason of a violation of" RICO); Fed. R. Civ. P. 23 (controls class actions).

STATEMENT OF THE CASE

1. The Complaint. The Petitioners were all property owners in a massive, recreational, real estate development (straddling two counties on approximately 3,856 acres), known as the "Valley of Lakes" (a/k/a "Eagle Rock Resort"), located near Hazleton, Pennsylvania. App., *infra*, 54a.

On June 17, 1994, the Petitioners filed a putative class action in the district court, on their behalf and on behalf of all other property owners (approximately 1,776), alleging, *inter alia*, an

ongoing pattern of racketeering in violation of civil RICO, initiated in 1986, by the developer, C.B.G. Ltd. and its affiliates (hereinafter collectively "CBG"), and related parties, which victimized the Petitioners by: (a) failing to complete the promised amenities (Arnold Palmer golf course, new lake, roads, water system, sewer system, etc.), and (b) failing to maintain the development, etc.

The complaint also named, as a defendant, CBG's primary financier, First Eastern Bank, N.A., and First Eastern Corporation ("First Eastern"), which loaned CBG approximately $20,000,000 prior to the bankruptcy, to complete the development. First Eastern merged with PNC Bank, N.A. in 1994 shortly after the complaint was filed (hereinafter collectively "PNC")[1].

The complaint alleged that PNC had participated in the pattern of racketeering by, *inter alia*, undertaking a scheme to conceal the insolvency of CBG from Petitioners--prior to its bankruptcy--by secretly subordinating all of its CBG loans to a second lender to deceive federal regulators conducting an audit, knowingly funding straw purchasers, illegally funneling payments to CBG, and numerous other unlawful actions.

The jurisdiction of the district court, with respect to civil RICO, was invoked under 18 U.S.C. § 1964(c), which accords jurisdiction to the district courts of the United States for civil RICO claims brought by "[a]ny person injured in his business or property by reason of a violation" of RICO.

The case was certified as a class action in 1995. App., *infra*, 54a-75a.

2. The Supplement. On May 27, 1998, after obtaining discovery from third parties, the Petitioners filed a motion to supplement and amend the complaint (hereinafter "supplement") (App., *infra*, 91a-100a). No party filed any opposition to said motion.

CBG had filed for bankruptcy protection, approximately

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[1] First Eastern Corp. was acquired by PNC's parent company, and later merged into Bankshares Realty Company.

two years prior to the filing of the complaint, on or about March 30, 1992, and would continue under bankruptcy protection until October, 1996, when its assets were sold in the bankruptcy court. The proposed supplement asserted that PNC had secretly, embezzled millions of dollars from CBG's bankruptcy estate, continuously, from April, 1992 until October, 1996 (App., *infra*, 92a-99a); thereby injuring the Petitioners, within the meaning of 18 U.S.C. § 1964(c), by depriving the bankruptcy estate of funds to maintain and complete the development (App., *infra*, 96a, ¶ 421). Some Petitioners lost their life savings.

PNC's massive bankruptcy fraud was made possible by a pre-bankruptcy, receivable line of credit between the bank and CBG (approximately $10,000,000), under which CBG had assigned, as collateral, its rights to receive mortgage payments from property owners to whom CBG had sold lots with purchase money mortgages from CBG. App., *infra*, 92a-93a, ¶ 407. An agent of the bank and CBG, C&E Credit, would (a) collect the mortgage payments from mortgagors, by mailing mortgage coupon booklets to them, (b) deposit the receivables in a bank account at the Dime Savings Bank of New York ("DIME account"), and (c) then wire two payments per month to the bank as payment on CBG's loan from the bank. *Id.*

Under the security agreement between CBG and PNC, the receivables remained the property of CBG. C.A. App. 5002-21 (Security Agreement). Consequently, after the bankruptcy, in order to continue to illegally siphon the receivable income stream from CBG's bankruptcy estate without disclosing the existence of this income stream to the bankruptcy court, the bank's attorneys knowingly misrepresented to the bankruptcy court, on April 30, 1992, that the bank was not receiving any payments from CBG, and the receivable line of credit was "not performing and in default", when in fact the bank continued to secretly embezzle the bankruptcy estate's receivables. App., *infra*, 94a-95a, ¶¶ 412-18. In fact, when these misrepresentations were made, the bank had just received two wire transfers from the bankruptcy estate: $164,651.00 on April

6, 1992, and $106,764.48 on April 22, 1992. App., *infra*, 94a, ¶ 413. To make this embezzlement possible, the DIME account was kept open throughout CBG's bankruptcy, in violation of the bankruptcy court's order of March 30, 1992, which ordered all of the debtor's pre-bankruptcy bank accounts closed. C.A. App. 9967-59 (order).

Further, throughout CBG's bankruptcy, C&E fraudulently mailed mortgage coupon booklets requesting payment be made to "First Eastern Bank" instead of the bankruptcy estate. App., *infra*, 98a, ¶ 427. This was done to induce payment by misleading the mortgagors into believing that they owed mortgage payments to the bank, instead of the bankruptcy estate. *See id.* As a result, the lot owners' mortgage checks were made payable to and endorsed for deposit by "First Eastern", thereby covering up the fact that these funds were actually owed to the bankruptcy estate, not the bank. *See id.* Tax statements, mailed to mortgagors, also misrepresented First Eastern as payee.

The bank continued this embezzlement of the bankruptcy estate's receivables from April, 1992, until the receivables were transferred in October, 1996. App., *infra*, 92a-93a, ¶ 407. The DIME bank records show that First Eastern and PNC were wired the following approximate amounts (net of C&E fees): $1,132,702.42 (1992); $897,867.44 (1993); $576,427.40 (1994); $409,651.94 (1995); and $264,182.78 (1996). C.A. App. 6094-899. This income stream from the receivables, as well as the payments on the bank's receivable loan, were fraudulently omitted from CBG's monthly statements filed with the bankruptcy court. App., *infra*, 95a, ¶ 419; C.A. App. 2564-68, 7383-414 (monthly statements).

At the same time that PNC was embezzling millions of dollars from the bankruptcy estate, PNC hired a management company, MLA Management Associates, Inc. ("MLA") to take control of the development (C.A. App. 7273-76, invoices), and to shut down a large portion of the development's facilities, under the false pretense that the bankruptcy estate did not have funds to pay for the operation and maintenance of the facilities

(C.A. App. 7269, directive to shut down electric supply). MLA and the bankruptcy estate kept these facilities shutdown, and provided hardly any maintenance to the development, for the duration of the bankruptcy; thereby, destroying the marketability of lots during the bankruptcy.

Finally, in October, 1996, in order to obtain bankruptcy court approval for the sale of CBG's assets, and to cover-up its massive bankruptcy fraud, PNC created the false appearance to the bankruptcy court that it owned the receivable mortgage notes. C.A., App. 1919, 1931, 1934 (agreement filed with court).

Based on this wrongdoing, the supplement alleged that PNC participated in the pattern of racketeering by undertaking "numerous RICO predicate acts of Bankruptcy Fraud (i.e., fraud connected with a case under title 11), Money Laundering[2] (18 U.S.C. § 1956), Mail Fraud (18 U.S.C. § 1341), and Wire Fraud (18 U.S.C. § 1343)." App., *infra*, 99a, ¶ 433.

3. The District Court Decision. On September 30, 1999, the district court denied the Petitioners' unopposed motion, of May 27, 1998, to supplement and amend the RICO claims based on the statute of limitations. *Dongelewicz v. First Eastern Bank*, 80 F. Supp. 2d 339, 341-42 (M.D. Pa. 1999) (App., *infra*, 16a-17a). The district court did not apply civil RICO's "separate accrual" rule under which "a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered,"[3] a new injury. *See id.*

The district court also, *inter alia*: granted summary judgment to PNC Bank N.A. on all RICO claims, holding that the evidence--prior to the supplement--only supported a finding that PNC had aided and abetted the RICO violations, which it concluded was no longer actionable in the wake of *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 656-57 (3d Cir. 1998) (holding "a private cause of action for aiding and abetting

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[2] *See United States v. Brennan*, 326 F.3d 176, 190-91 (3d Cir. 2003) (holding that subsequent financial transactions intended to conceal proceeds from bankruptcy fraud constitutes money laundering).

[3] *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995).

a RICO violation cannot survive the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)."). *Dongelewicz*, 80 F. Supp. 2d at 343-45 (App., *infra*, 19a-24a).

Further, the district court decertified the class action, holding that in the wake of *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (abrogating the Third Circuit's last predicate act rule), class action treatment was inappropriate because adjudication of the statute of limitations defense using the "injury plus pattern discovery rule" required "consideration of widely differing factual circumstances...." *Dongelewicz*, 80 F. Supp. 2d at 342-43 (App., *infra*, 18a-19a).

The Petitioners filed a motion for reconsideration, reiterating, *inter alia*, that it was a clear error of law for the district court "to have ignored RICO's 'separate accrual rule'", and to have held that claims were barred by the statute of limitations "which plaintiffs only uncovered through discovery...." Br. for Pls. in Supp. of Pls.' Mot. for Recons. of Order of Sept. 30, 1999 at 16, 21-22, *Dongelewicz*, No. 3:CV-95-0457 (M.D. Pa. Feb. 8, 2000) (App., *infra*, 42a-53a). On February 8, 2000, the district court denied Petitioners' motion for reconsideration, again refusing to apply the separate accrual rule, and held, with respect to Petitioners' motion to supplement:

> Plaintiffs again argue that the statute of limitation does not apply to acts occurring after the filing of the complaint. That principle can be said to be correct, but the same accrual date applies, based on the "injury plus pattern" rule.

App., *infra*, 46a (emphasis added).

The district court certified an interlocutory appeal, however, which included, *inter alia*, the certified issues:

> Whether the court erred by denying leave to amend and supplement the complaint based on the applicability of the statute of limitations;
>
> ....
>
> Whether the court erred in decertifying the class and

> subclasses based on the defense of statute of limitations, which would be unique to each plaintiff; ....

App., *infra*, 52a-53a.

The Third Circuit denied permission for an interlocutory appeal. C.A. App. 327-32. On December 12, 2002, the district court certified a final judgment pursuant to Fed. R. Civ. P. 54(b). C.A. App. 3-8.

4. The Third Circuit Decision. Petitioners timely filed their notice of appeal on January 3, 2003. C.A. App. 1-2. Petitioners raised, *inter alia*, the same issues certified by the district court, regarding the supplement, and decertification. Br. for Appellants at 3, *Dongelewicz v. PNC Bank, N.A.*, No. 03-1045, 2004 WL 1661863 (3d Cir. July 23, 2004).

Petitioners argued that the district court had erred by denying leave to amend and supplement the complaint based on the applicability of the statute of limitations, including, *inter alia*, because (a) "even if the supplement did not relate back, many of the events stated in the supplemental pleading took place between May 27, 1994 and October, 1996, and would therefore not be barred", *id.* at 57-60; and (b) the Petitioners "could not have learned of [the injuries] until discovery because of the concealment by the bank alleged therein", Reply Br. for Appellants at 20, *Dongelewicz v. PNC Bank, N.A.*, No. 03-1045, 2004 WL 1661863 (3d Cir. July 23, 2004).

Petitioners further argued that decertification was not warranted because, *inter alia*, (a) the injury discovery rule does not present the complexities of the injury plus pattern discovery rule; (b) the appropriate remedy to solve any individualized issues pertaining to class certification was redefinition of the class period, or judicious severance; and (c) the district court could simply define the class period as including only injuries which took place within the limitations period, thereby obviating any discovery issues altogether. Br. for Appellants at 60-62, *Dongelewicz v. PNC Bank, N.A.*, No. 03-1045, 2004 WL 1661863 (3d Cir. July 23, 2004).

On July 23, 2004, the Third Circuit affirmed the district

court's denial of the Petitioners' unopposed motion to supplement. *Dongelewicz v. PNC Bank, N.A.*, 2004 WL 1661863, No. 03-1045 (3d Cir. July 23, 2004) (App., *infra*, 1a-15a). The Third Circuit noted that the Petitioners contended that PNC siphoned the bankruptcy estate's income streams throughout CBG's bankruptcy, *id.* at *1-2 (App., *infra*, 5a-6a); thereby continuously injuring the Petitioners until October, 1996. Nonetheless, the Third Circuit did not apply the separate accrual rule; nor did the Third Circuit find that the Respondents' concealment prevented Petitioners from discovering their injuries, or justify tolling the statute of limitations under the doctrine of fraudulent concealment. *Id.* at *2-3 (App., *infra*, 7a). Instead, the Third Circuit held that all of the predicate acts, alleged in the supplement, accrued at the very beginning of the developer's bankruptcy, in April 1992, reasoning that the Petitioners should have been on inquiry notice based on Respondents' conduct as of said date, as follows:

> [A]s the District Court found, all of the allegations made in the proposed supplement concern conduct which came to the attention of the lot owners over six years before they moved for leave to supplement in 1998. The supplemental claims were therefore untimely. The lot owners knew that CBG was in bankruptcy as of its filing on March 30, 1992. By April 1992, the lot owners' mortgage checks were made payable to and endorsed for deposit by First Eastern (App 5558-61), and the bankruptcy stay, which they now allege First Eastern was violating by cashing their checks, was issued on March 30, 1992.

Id. (emphasis added). For its holding, the Third Circuit relied on *Mathews v. Kidder, Peabody Co.*, 260 F.3d 239, 247 (3d Cir. 2001) (holding that all civil RICO claims accrue on the date of "storm warnings" if the plaintiffs did not immediately investigate, even if the plaintiffs could not have discovered the wrongdoing). *See Dongelewicz*, 2004 WL 1661863 at *2-3 (App., *infra*, 7a). The Third Circuit also held that the

"supplement cannot relate back [to the complaint's filing date] under Fed. R. Civ. P. 15(c)(2)". *Id.*

Further, the Third Circuit affirmed decertification, holding: "Under the injury discovery rule, the court must still determine when each lot purchaser, by the exercise of diligence, should have discovered she was injured." *Id.* at *4 (App., *infra*, 9a).

On August 19, 2004, the Third Circuit denied a timely, Petition for Rehearing. App., *infra*, 76a-77a.

REASONS FOR GRANTING THE WRIT

Circuit conflicts regarding civil RICO accrual, which have been percolating for many years, as discussed *infra*, continue to be widespread and a source of uncertainty and unpredictability, including: (a) whether to apply the separate accrual rule for RICO claims; (b) what constitutes injury "discovery" to trigger accrual of the civil RICO statute of limitations; and (c) what are the elements for the equitable tolling doctrine of fraudulent concealment, applicable to civil RICO. Moreover, these conflicts in the courts of appeal are particularly intolerable since they encourage forum shopping given that RICO predicate acts in a pattern will often occur in several States. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) ("Thus, predicate acts will often occur in several States."). Because these issues were adjudicated in this case in a motion to supplement the complaint, this appeal presents these issues squarely as a matter of law. Further, as discussed *infra*, a conflict exists regarding whether an individualized limitations defense bars class certification.

When enacted in 1970, RICO did not contain a statute of limitations for either criminal or civil prosecutions. In criminal RICO, courts apply the general five-year limitations period of 18 U.S.C. § 3282, governing non-capital criminal offenses. *See United States v. Walsh*, 700 F.2d 846, 851 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). In civil RICO, on the other hand, where no applicable statutory limitations period exists, the Supreme Court has intervened several times because the lower courts have failed to achieve uniformity and predictability in the

application of limitation periods.

In *Malley-Duff*, 483 U.S. 143, the Supreme Court held that civil RICO claims are governed by the 4-year statute of limitations for Clayton Act actions, 15 U.S.C. § 15b. However, the Supreme Court did not settle on "the appropriate time of accrual for a RICO claim." *Id.* at 156-57. As a result, the circuits developed three primary accrual rules in the wake of *Malley-Duff*: (1) "injury discovery accrual" rule (accrual when the plaintiff should have discovered injury); (2) "injury and pattern discovery" rule (accrual when the plaintiff should have discovered injury and pattern); and (3) the Third Circuit's "last predicate act" rule (accrual of all predicate acts when the plaintiff should have discovered the last predicate act in the pattern). *See, e.g., Rotella v. Wood*, 528 U.S. 549, 553-55 (2000).

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), the Supreme Court rejected the Third Circuit's last predicate act rule, but declined to settle what constitutes accrual of the civil RICO statute of limitations. Second, the Court expressly recognized the split in the circuits regarding the separate accrual rule, noting that "the 'separate accrual' civil RICO rule" has been "adopted by some Circuits...." *Id.* at 180-81. The Court, however, held that the facts of *Klehr* did not implicate the separate accrual rule since "[u]nder the separate accrual rule... the plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period...", which would have been necessary to permit recovery in *Klehr* because the plaintiffs did not show any continuing injuries from subsequent predicate acts. *Id.* at 181. Third, the Court held that "reasonable diligence" is an element of the doctrine of fraudulent concealement "in the context of civil RICO", but did not otherwise resolve the split in the circuits regarding the elements for fraudulent concealment. *See id.* at 193-96; *Supermarket of Marlington v. Meadow Gold Dairies*, 71 F.3d 119, 122-26 (4th Cir. 1995) (classifying the different tests for fraudulent concealement in the circuits).

Subsequently, in *Rotella* the Supreme Court rejected the "injury and pattern discovery" accrual rule; however, the Court once again declined to settle what constitutes accrual of the civil RICO statute of limitations, expressly stating that it had not yet "settled upon a final rule". *Rotella*, 528 U.S. at 554 n.2. The Supreme Court also left "open the possibility of a straight injury occurrence rule". *Id.* Second, the Court expressly reserved the issue of whether the separate accrual rule is applicable, as follows:

> [W]e need not and do not decide whether civil RICO allows for a cause of action when a second predicate act follows the injury, or what limitations accrual rule might apply in such a case.

Id. at 557-60 n.4. Third, the Court reiterated that civil RICO is "subject to equitable principles of tolling", citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), but did not address the elements of fraudulent concealment. *Id.* at 560.

As a result of the lack of a uniform accrual rule, in the wake of *Malley-Duff*, *Klehr*, and *Rotella*, it is widely recognized by both courts and commentators that the lower courts and litigants continue to struggle with uncertainty and unpredictability in civil RICO accrual. In *Forbes v. Eagleson*, 228 F.3d 471, 484 (3d Cir. 2000), the Third Circuit noted the continuing uncertainty and unpredictability in civil RICO accrual:

> Thus, once again we must make a decision regarding when a RICO action accrues even though we are aware that the Supreme Court ultimately may accept or reject our choice.

In *Mathews*, the Third Circuit reiterated that civil RICO accrual "remains a source of controversy". *Mathews*, 260 F.3d at 244.

Likewise, commentators have noted the continuing uncertainty and unpredictability in civil RICO accrual. *See generally* Meridyth Andresen, Note, *Dodging the Question: The Supreme Court's Refusal To Commit to a Universal Interpretation of the Accrual of the Statute Of Limitations for*

Civil RICO, 27 J. Corp. L. 275, 292 (2002) ("Without the commanding precedential force of a Supreme Court interpretation, the circuit courts are likely to keep inventing new accrual rules."); Laura E. Albright, *Rotella v. Wood: The Supreme Court Eliminates Another Accrual Rule For Civil Rico*, 23 U. Haw. L. Rev. 665, 680 (2001) ("[T]he Court's approach to resolving the accrual issue imposes uncertainty and unpredictability on both litigants and lower courts."); Erwin Chemerinsky, *Plaintiffs' Use of RICO Limited*, 36-JUL Trial 123, 123 (2000) ("[It would seem that the Supreme Court would want to end the division among the circuits and choose a clear rule as to when the clock begins to run on civil RICO claims.").

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER CIVIL RICO IS SUBJECT TO A "SEPARATE ACCRUAL" RULE.

This case squarely presents the issue of whether civil RICO is subject to a separate accrual rule as a matter of law. If the Third Circuit recognized the separate accrual rule, all of the continuing injuries incurred by Petitioners, relating to the bankruptcy estate, between May 27, 1994 and October, 1996 (App., *infra*, 92a-93a, 96a, ¶¶ 407, 421), would have been within the four year limitations period since the motion to supplement the complaint was filed on May 27, 1998. *See, e.g., Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103-07 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (holding continuing injuries incurred by plaintiff relating to bankruptcy estate were within limitations period, applying separate accrual rule).

A. The Third Circuit has split with the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which apply the separate accrual rule in civil RICO, statute of limitations.

Since the issue has not been settled by the Supreme Court, the split in the circuits regarding the separate accrual rule has festered for many years. In particular, the Third Circuit, which fails to apply any separate accrual rule, directly conflicts with other circuits which apply the separate accrual rule. *See, e.g.*,

McCool v. Strata Oil Co., 972 F.2d 1452, 1465 (7th Cir. 1992) ("Following the First, Second, Eighth, Ninth, Tenth and Eleventh Circuits, we also apply a 'separate accrual' rule to civil RICO claims."); *Bankers Trust*, 859 F.2d at 1105 ("[W]e today hold that civil RICO actions are subject to a rule of separate accrual."); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (recognizing separate accrual rule in civil RICO in Ninth Circuit); *see also Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 359 F.3d 226, 236-37 (3d Cir. 2004) (holding all predicate acts as accruing at beginning of pattern, and rejecting accrual based on "actual injuries"); *Love v. National Medical Enter.*, 230 F.3d 765, 774-75 (5th Cir. 2000) ("[W]e hold that the *Bankers Trust* 'separate accrual' rule applies in civil RICO actions."); *Grimmet v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996), *cert. dismissed*, 519 U.S. 233 (1997) ("This Circuit has also adopted the separate accrual rule.") (citing *Ammann*, 828 F.2d at 5 (Kennedy, J., concurring)); *Bingham v. Zolt*, 66 F.3d at 559-60 (affirming lower court's application of separate accrual rule); s*ee generally* Ann K. Wooster, Annotation, *Statute Of Limitations In Civil Actions For Damages Under The Racketeer Influenced And Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968*, 156 A.L.R. Fed. 361 (2004) (§ 4. Separate accrual; multiple injuries) (identifying the following circuits as having applied the separate accrual rule: First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh); Frederick B. Lacey, *Civil RICO Update*, SF42 ALI-ABA 827, 837 (2001) (noting that in the wake of *Klehr* and *Rotella* "there are still open issues", and "the Fifth Circuit Court of Appeals adopted a 'separate accrual rule' which can permit a RICO plaintiff to recover.") (citing *Love*, 230 F.3d 765).

B. The issue of separate accrual is important and recurring because, as the Second Circuit recognized: "Multiple injuries, spread over time, frequently result from the very nature of a RICO violation."

"The heart of any RICO complaint is the allegation of a

pattern of racketeering." *Malley-Duff*, 483 U.S. at 156-57. *See also H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 at 236 (1989) (noting "RICO's key requirement" is the "pattern of racketeering"). "Because a single RICO violation consists of a 'pattern' of illegal acts, 'each of which, standing alone, may injure a plaintiff', multiple injuries may be caused by a single RICO violation." *Love*, 230 F.3d at 773 (quoting *Bankers Trust*, 859 F.2d at 1103, adopting separate accrual rule).

Consequently, the issue of whether a new claim accrues each time a plaintiff discovers, or should have discovered, a new injury is important and recurring since it is fundamental to a great portion of all civil RICO cases. *See, e.g., Bankers Trust*, 859 F.2d at 1103 (adopting separate accrual rule, reasoning: "Multiple injuries, spread over time, frequently result from the very nature of a RICO violation.").

C. The decision below is wrong because the separate accrual rule is compelled by, *inter alia*, the plain meaning of 18 U.S.C. § 1964(c), the Clayton Act's statute of limitations jurisprudence, and to avoid granting prescriptive rights to RICO violators.

It was erroneous for the Third Circuit to fail to apply the separate accrual rule. First, as the Second Circuit held in *Bankers Trust*, RICO's plain language expressly states that a civil RICO action may be filed only by a "person injured in his business or property by reason of a violation of [18 U.S.C. §] 1962". *Bankers Trust*, 859 F.2d at 1102 (quoting 18 U.S.C. § 1964(c)). "Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued". *Id.* (emphasis added). Congress expressly enacted this plain language of Section 1964(c) because of the pattern nature of RICO, which inherently involves multiple injuries, as the Fifth Circuit recognized:

> Recognizing the potential for such multiple injuries, "[C]ongress tied the right to sue for damages under § 1964(c), not to the time of the defendant's RICO

> violation, but to the time when plaintiff suffers injury to 'his business or property' from the violation". *Id.* "The logical end result is that a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred". *Id.*

Love, 230 F.3d at 773 (quoting *Bankers Trust*, 859 F.2d at 1103) (emphasis added).

Second, the separate accrual rule is supported by the Clayton Act's statute of limitations jurisprudence (the model recognized by the Supreme Court for RICO's statute of limitations), since the Clayton Act's statute of limitations is focused on the occurrence of the injury. *See, e.g., Bankers Trust*, 859 F.2d at 1103-04; *Ammann*, 828 F.2d at 5 (Kennedy, J., concurring) (recognizing separate accrual rule based on application of separate accrual rule in section 1983 and antitrust actions since "the same federal accrual rule applies in RICO actions as in section 1983 and antitrust actions".). As the Second Circuit noted:

> Generally, a cause of action under the Clayton Act accrues and the statute of limitations begins to run, when a defendant commits an antitrust violation that injures a plaintiff's business.

Bankers Trust, 859 F.2d at 1104.

Third, as the Supreme Court recognized in *Klehr*:

> [T]he 'separate accrual' civil RICO rule ... is similar to the 'continuing violation' doctrine in antitrust, in that the commission of a separate, new predicate act within the 4-year limitations period permits a plaintiff to recover for the additional damages that act caused."

Klehr, 521 U.S. at 180-81 (emphasis added). "Under that doctrine, damages for future injuries for which no separate claim has yet accrued are recoverable, unless 'the fact of their accrual is speculative or their amount and nature unprovable'." *Love*, 230 F.3d at 774 (quoting *Bankers Trust*, 859 F.2d at 1104).

Fourth, the separate accrual rule is compelled by the "speculative injury" antitrust precedent of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 340 (1971) because RICO plaintiffs cannot bring suit until they sustain injury and bringing suit based upon future injuries would be speculative. *See Bankers Trust*, 859 F.2d at 1104-05. As the Second Circuit reasoned, in adopting the separate accrual rule:

> 'Otherwise, future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery'.

Bankers Trust, 859 F.2d at 1105 (quoting *Zenith Radio*, 401 U.S. at 340).

Fifth, the separate accrual rule is the logical application to a pattern of RICO predicate acts of any injury based civil RICO accrual rule, i.e., injury discovery or injury occurrence, as identified in *Rotella*, since accrual under these injury centric accrual rules is actual injury from predicate acts, and not the underlying commission of the predicate act. As the Fifth Circuit recognized in adopting the separate accrual rule:

> Our court having adopted the "injury discovery" rule, it would seem illogical to conclude that, under civil RICO, a plaintiff may *not* recover for injuries incurred within the limitations period, merely because they result from acts that are part of a continuing pattern of similar acts that caused other, similar injuries outside that period.

Love, 230 F.3d at 774 (emphasis in original). For this reason, the separate accrual rule is generally applied by those circuits which originally adopted the "injury discovery" rule or the "injury and pattern discovery" rule. *See, e.g., Grimmet*, 75 F.3d at 510-11 (noting circuits which originally adopted the "injury discovery" rule, and "injury and pattern discovery" rule recognize the "separate accrual rule").

Sixth, in the wake of *Rotella*, which rejected the "injury and pattern discovery" accrual rule, failure to apply the separate accrual rule would often result in the absurdity of the limitations

period expiring before the cause of action is complete, since the first predicate act causing injury may trigger the running of the limitations period before the pattern element has been established. *See Rotella*, 528 U.S. at 557-60 n.4 (noting "[s]ome Circuits apply injury and pattern discovery out of fear that when the injury precedes a second predicate act, the limitations period might otherwise expire before the pattern is created."); *H.J. Inc.*, 492 U.S. at 242 (holding that "[p]redicate acts extending over a few weeks or months" do not normally constitute a pattern).

Seventh, failure to apply the separate accrual rule will place federal courts in the position of granting prescriptive rights to RICO violators to injure anew in the same manner with immunity. Specifically, without the separate accrual rule, additional RICO predicate acts--occurring after the expiration of the limitations period for the initial predicate acts--would not be actionable. This result conflicts with the core congressional intent, underlying civil RICO, to encourage civil litigation to supplement government efforts to deter and penalize the respectively prohibited practices. *See, e.g., Rotella*, 528 U.S. at 557 ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.") (quoting *Klehr*, 521 U.S., at 187).

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHAT CONSTITUTES "DISCOVERY" OF INJURIES TO TRIGGER ACCRUAL OF THE CIVIL RICO STATUTE OF LIMITATIONS.

This case squarely presents the issue of what constitutes "discovery" of injuries, as a matter of law, since the Third Circuit affirmed the district court's denial of the Petitioners' motion to supplement the complaint, holding that the Petitioners should have discovered their injuries more than six years prior to the filing of the motion to supplement, as a matter of law. *Dongelewicz*, 2004 WL 1661863 at *2-3 (App., *infra*, 7a).

A. Multiple conflicts continue to fester in the circuits regarding application of the injury discovery rule.

In the wake of *Rotella*, it is clear that discovery of the pattern of racketeering is not necessary to trigger accrual, although it may be relevant to tolling issues. *Rotella*, 528 U.S. at 560. However, a number of conflicts fester in the circuits regarding application of the injury discovery rule.

In *Mathews*, the Third Circuit adopted a two part "inquiry notice", injury discovery rule, as follows:

> First, the burden is on the defendant to show the existence of 'storm warnings.' ....
>
> Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries. This inquiry is both subjective and objective. The plaintiffs must first show that they investigated the suspicious circumstances.

Mathews, 260 F.3d at 252 (emphasis added). This is a "fraud discovery rule", i.e., an accrual rule which is initially triggered by plaintiff's knowledge of the defendant's fraudulent conduct, in the form of "storm warnings", which the Third Circuit derived from securities law[4]. *See Mathews*, 260 F.3d at 251-52.

First, the Third Circuit's injury discovery rule--which holds that notice of the defendant's fraudulent *conduct* constitutes inquiry notice of injury--conflicts with those circuits which hold that only notice of injury constitutes injury discovery. *Compare Mathews*, 260 F.3d at 251-52 (holding presence of "storm warnings" of defendant's fraudulent conduct places plaintiff on inquiry notice) *with Love*, 230 F.3d at 776-77 (rejecting rule that civil RICO accrues when plaintiff becomes aware of defendant's "fraudulent conduct" as contravening injury

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[4] *See generally* Lawrence Kaplan, Annotation, *What Constitutes "Inquiry Notice" Sufficient to Commence Running of Statute of Limitations in Securities Fraud Action--Post-Lampf Cases*, 148 A.L.R. Fed. 629 (1998).

discovery rule) *and Matter of VMS Ltd. Partnership Sec. Litig.*, 803 F. Supp. 179, 189 (N.D. Ill. 1992) ("In short, it is the injury to the plaintiff, not the racketeering activity, that triggers the statute of limitations for civil RICO claims.") (citing *Landy*, 734 F. Supp. at 625) *and Landy v. Mitchell Petroleum Technology Corp.*, 734 F. Supp. 608, 625 (S.D.N.Y. 1990) ("[I]t is the injury, not the racketeering activity which triggers the statute of limitation for a RICO action").

Second, the Third Circuit's application of the diligence element as a partially subjective test, i.e., the plaintiff must investigate if storm warnings exist even if investigation would be futile[5], directly conflicts with other circuits, which apply reasonable diligence as a strictly objective test, i.e., the plaintiff need not have investigated if investigation would have been futile. *Compare Mathews*, 260 F.3d at 252 n.16 (holding plaintiff must investigate even if futile) *with Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 836 (11th Cir. 1999) (holding "The actual exercise of diligence is irrelevant because the standard is an objective one.") (citations omitted) *and Stern v. Grossman*, No. 86 CIV. 0837, Fed. Sec. L. Rep. (CCH) ¶ 94425, 1989 WL 38349, at *2-3 (S.D.N.Y. 1989) (holding civil RICO limitations did not accrue where defendants failed to show that reasonably diligent inquiry would have led to actual knowledge of the fraud).

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[5] In *Mathews*, the Third Circuit expressly held with respect to the reasonable diligence element that "The plaintiffs must first show that they investigated the suspicious circumstances", even if "reasonable diligence would not have uncovered their injury", reasoning:

> We are reluctant to excuse Appellants' lack of inquiry because, in retrospect, reasonable diligence would not have uncovered their injury. Such a holding would, in effect, discourage investigation of potential racketeering activity. *See Rotella*, 528 U.S. at 557, 120 S.Ct. at 1082. Therefore, if storm warnings existed, and the Appellants chose not to investigate, we will deem them on inquiry notice of their claims.

Mathews, 260 F.3d at 252 n.16 (emphasis added).

Third, as the Third Circuit expressly acknowledged in *Mathews*, its inquiry notice rule conflicts in its application with the Eleventh Circuit which deems it improper for the district court to apply the rule as a matter of law where contrary evidence of the plaintiff's knowledge exists, as follows:

> Thus, at least in the RICO context, we disagree with the Eleventh Circuit Court of Appeals, which has held that "as a general rule, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question for summary judgment." *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999).

Mathews, 260 F.3d at 250 n.13 (emphasis added).

Fourth, the Third Circuit's holding--that the "storm warnings" of the Respondents' endorsement of the lot owners' mortgage checks in April, 1992 caused all of the Petitioners' civil RICO claims to accrue in April, 1992, as a matter of law --is unprecedented, and conflicts with the majority rule, which holds that notice of one wrong does not constitute notice of all possible wrongs. *See Morton's Mkt.*, 198, F.3d at 833-34.

B. The issue of what constitutes "discovery" to trigger accrual in civil RICO is important and recurring because it is present in all civil RICO cases where the statute of limitations defense is asserted.

Under the injury discovery rule, adopted by many of the circuits in the wake of *Rotella*, the issue of what knowledge constitutes "discovery" for statute of limitations purposes is present in every civil RICO case where the statute of limitations is an issue. *See Rotella*, 528 U.S. 553 (noting "injury discovery rule [starts] the clock when a plaintiff knew or should have known of his injury.") (citations omitted).

Only if the injury occurrence rule is adopted would "discovery" be immaterial to accrual of a civil RICO cause of action. *See, e.g., Forbes*, 228 F.3d at 484.

C. The decision below is wrong because, *inter alia*, under the injury discovery rule, civil RICO claims only accrue when plaintiffs should have discovered their injuries, not the defendants' wrongful conduct, and irrespective of whether the particular plaintiff actually investigated "storm warnings".

First, the Third Circuit's holding that the Petitioner's civil RICO claims accrued in April, 1992--triggered by the "storm warnings" of the Respondents' endorsement of the lot owner's checks on that date--was erroneous because the Third Circuit's "storm warnings" rule is an improper "fraud discovery rule" which turns the injury discovery rule on its head. As the Fifth Circuit has held:

> To the extent that the district court's opinion could be interpreted as holding that [the plaintiff's] civil RICO claims accrued when it became aware in 1991 of [defendants'] allegedly fraudulent conduct, such a conclusion would be erroneous, because, again, under the injury discovery rule, the claims did *not* accrue until [the plaintiff] knew, or should have known, that it suffered an injury caused by that allegedly fraudulent conduct.

Love, 230 F.3d at 776-77 (emphasis added). As *Landy* held:

> [U]ntil there is a right to sue under § 1964(c), a civil RICO action cannot be said to have accrued." *Id.* Thus, it is the injury, not the racketeering activity which triggers the statute of limitation for a RICO action.

Landy, 734 F. Supp. at 625 (emphasis added).

In *Mathews*, the Third Circuit, itself, recognized the distinction between injury discovery and fraud discovery, used in securities fraud claims, noting that "the difference is subtle, but in some circumstances, it can be dispositive". *See Mathews*, 260 F.3d at 251. Nonetheless, the Third Circuit erroneously adopted a "fraud discovery" rule based on securities law, instead of antitrust law. *See id.*; *see also Malley-Duff*, 483 U.S. at 150-

52 (1987) (holding the Clayton Act offers the closest analogy to civil RICO); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (The "clearest current" in the legislative history of RICO "is the reliance on the Clayton Act model."). Moreover, in many civil RICO cases--such as this case--the time difference between fraud discovery and injury discovery will be dispositive. In this case, although the first checks were endorsed by the bank in April, 1992, the injuries to Petitioners from that fraudulent conduct actually took place when the bankruptcy estate ran out of funds to maintain the development, which continued until October, 1996. App., *infra*, 96a, ¶ 421.

Second, it was erroneous for the Third Circuit to apply its due diligence requirement as a partially subjective test, so as to deem Petitioner's civil RICO claims to have accrued in April, 1992, once it concluded that the Petitioners had not investigated the "storm warnings", without considering whether such investigation would have been futile without legal discovery. By doing so, the Third Circuit contravened the injury discovery rule, itself, which holds that accrual only takes place when the plaintiffs should have discovered their injury. *See, e.g., Stern v. Grossman*, No. 86 CIV. 0837, Fed. Sec. L. Rep. (CCH) ¶ 94425, 1989 WL 38349, at *2-3 (S.D.N.Y. 1989) (holding civil RICO limitations did not accrue, as a matter of law, where defendants failed to show that reasonably diligent inquiry by the plaintiffs would have led to actual knowledge of the wrongdoing); *see also Forbes*, 228 F.3d at 484 (holding civil RICO accrues when plaintiffs should have discovered their injury).

Third, it was erroneous for the Third Circuit to decide the issue of due diligence as a matter of law because, as the Eleventh Circuit held, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question to be decided as a matter of law since (a) the district court "must resolve all doubt against the moving party", and (b) "[t]his standard is applied with particular stringency where it is claimed that the defendant's conduct

prevented the plaintiff from discovering his claim prior to the expiration of the limitations period." *See Morton's Mkt.*, 198, F.3d at 832-33 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and *In re Carbon Dioxide Antitrust Litig.*, 1993-2 CCH Trade Cases ¶ 70,436 at 5 (M.D. Fla. 1993)). In *Klehr*, the Court recognized that a "due diligence" requirement is a "fact-based question". *Klehr*, 521 U.S. at 181. In fact, the Third Circuit in *Mathews*, itself, recognized that "the issue is extremely fact-specific." *See Mathews*, 260 F.3d at 250 (citing *Davis v. Grusemeyer*, 996 F.2d 617, 623 n.10 (3d Cir. 1993)).

Moreover, the Third Circuit's application of the *Mathews* rule, as a matter of law, was particularly egregious in this case because the issue arose in the context of a motion to supplement[6] in which the supplement identified evidence showing that the defendant's conduct prevented the Petitioners from discovering their claims, e.g., (a) PNC misrepresented to the bankruptcy court that it was not receiving "any payments from CBG on its loans"; (b) "CBG's monthly filings with the bankruptcy court concealed CBG's income"; etc. App., *infra*, 94a-99a, ¶¶ 412, 419, 422, 424, 426, 427, 429, 431.

Fourth, the Third Circuit's holding that "storm warnings" of one type of wrong constitutes inquiry notice for all of the wrongs constituting the pattern of racketeering is illogical and harsh. As the majority rule holds, notice of one wrong does not necessarily constitute notice for other types of wrongs. *See Morton's Mkt.*, 198, F.3d at 833-34.

III. REVIEW IS WARRANTED BECAUSE THE THIRD CIRCUIT'S "ACTIVE MISLEADING" RULE FOR FRAUDULENT CONCEALMENT DIRECTLY CONFLICTS WITH THE SUPREME COURT'S *HOLMBERG* PRECEDENT, AND OTHER CIRCUITS.

This case squarely presents the issue of what acts are sufficient to invoke fraudulent concealment since the Petitioners

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[6] Leave to amend complaint should be freely given in absence of undue delay, bad faith, undue prejudice, or futility of amendment. Fed. R. Civ. P. 15(a). *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

expressly alleged that the Respondents had concealed their wrongdoing (App., *infra*, 94a-99a, ¶¶ 412, 419, 422, 424, 426, 427, 429, 431), yet the Third Circuit did not invoke fraudulent concealment, and affirmed the denial of Petitioners' motion to supplement, as a matter of law. *See Dongelewicz*, 2004 WL 1661863 at *2-3 (App., *infra*, 7a).

A. There is a conflict in the circuits regarding the elements of fraudulent concealment.

In the wake of *Klehr* and *Rotella*, it is clear that the civil RICO statute of limitations is subject to tolling pursuant to the doctrine of fraudulent concealment. *See Rotella*, 528 U.S. at 560 (holding fraudulent concealment is available in civil RICO); *Klehr*, 521 U.S. at 194-96 (addressing reasonable diligence element of doctrine of fraudulent concealment in civil RICO).

The circuits remain split, however, regarding the elements of fraudulent concealment. Specifically, the circuits have adopted the following conflicting standards: (1) the "self-concealing" standard; (2) the "separate and apart" standard; and (3) the "affirmative acts" standard. *See, e.g., Supermarket of Marlington v. Meadow Gold Dairies*, 71 F.3d 119, 122-26 (4th Cir. 1995).

On the other hand, the Third Circuit has adopted an "active misleading" rule which requires that a plaintiff prove "active misleading" by the defendant to justify tolling under the fraudulent concealment doctrine. *See Forbes*, 228 F.3d at 486-87 ("The plaintiff must show *active misleading* by the defendant....") (citations omitted) (emphasis in original). Moreover, as demonstrated by this case, the Third Circuit will not toll the statute of limitations based on fraudulent concealment once it concludes that the due diligence element was not met, as part of its inquiry notice, discovery test, (App., *infra*, 7a). *See Mathews*, 260 F.3d at 257. Consequently, the split in the circuits regarding whether the reasonable diligence element should be applied as a subjective or objective test which pervades the injury discovery rule, also pervades the application of the fraudulent concealment doctrine. *See supra* p. 19;

compare Mathews, 260 F.3d at 252 n.16 (holding plaintiff must investigate even if futile) *with Morton's Mkt.*, 198 F.3d at 836 ("The actual exercise of diligence is irrelevant because the standard is an objective one.") (citations omitted).

B. The issue is important and recurring because fraudulent concealment is a critical element in adjudicating the statute of limitations in civil RICO in the wake of *Rotella*.

In the wake of *Rotella*, fraudulent concealment is a key issue in a large portion of all civil RICO cases now that pattern discovery is not part of the main accrual rule. As the Supreme Court reaffirmed in *Rotella*, civil RICO remains subject to equitable principles of tolling, citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), and "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty...." *Rotella*, 528 U.S. 561 (citing *Holmberg*, 327 U.S. at 397, and *Klehr*, 521 U.S., at 192-93).

C. The decision below is wrong because, *inter alia*, the Third Circuit's "active misleading" rule for fraudulent concealment directly conflicts with the Supreme Court's *Holmberg* precedent.

First, the Third Circuit's "active misleading" rule which mandates that plaintiffs must prove "active misleading" by defendants to permit tolling under the fraudulent concealment directly conflicts with *Holmberg*, which held that the doctrine of fraudulent concealment is applicable even where the defendant has not actively mislead the plaintiff. *Holmberg*, 327 U.S. at 397. In *Holmberg*, the Supreme Court held:

> And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances

> or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 21 Wall. 342, 348, 22 L.Ed. 636; and *see Exploration Co. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200; *Sherwood v. Sutton*, Fed. Cas. No. 12,782, 5 Mason 143.

Id. (emphasis added). Moreover, the Third Circuit's "active misleading" rule also conflicts with the cardinal equity principle that mechanical rules are improper for interpreting equitable tolling since the "active misleading" rule is a "mechanical" application of the fraudulent concealment doctrine. *See id.* ("Equity eschews mechanical rules; it depends on flexibility.").

Second, the Third Circuit's application of its due diligence requirement as a partially subjective test in this case is not only wrong for the reasons stated *supra* p. 22, but also because it contravenes the cardinal principles of fraudulent concealment, which hold that the due diligence element is an objective test. *See Klehr*, 521 U.S. at 195-96 ("in Civil RICO, the concealment requirement is satisfied if the plaintiff shows that he neither knew nor, in the exercise of due diligence, *could reasonably have known* of the offense.") (quoting 2 Areeda ¶ 338, at 152) (citations omitted) (emphasis added); *Morton's Mkt.*, 198 F.3d at 836 ("The actual exercise of diligence is irrelevant because the standard is an objective one.") (citations omitted).

Therefore, the Third Circuit's failure to apply the fraudulent concealment doctrine in a flexible manner, taking into account the particular facts of this case, as mandated by *Holmberg*, contravenes the cardinal principles of equity.

IV. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER AN INDIVIDUALIZED STATUTE OF LIMITATIONS DEFENSE BARS CLASS CERTIFICATION.

This case squarely presents the issue of whether an individualized statute of limitations defense bars class certification since the class action was decertified for this sole reason, *see Dongelewicz*, 80 F. Supp. 2d at 342-43 (App., *infra*,

18a-19a); *see also Dongelewicz*, 2004 WL 1661863 at *3-4 (App., *infra*, 7a-9a) (Third Circuit affirmance); and the district court originally certified this issue for appeal, (App., *infra*, 53a).

A. There is a conflict in the circuits regarding whether an individualized statute of limitations defense bars class certification.

In holding, in this case, that class certification was inappropriate because "under the injury discovery rule", applicable in the wake of *Rotella*, "the court must still determine when each lot purchaser, by the exercise of diligence, should have discovered she was injured", the Third Circuit sided with the minority position, in the circuit split, which holds that the presence of an individualized statute of limitations, affirmative defense, necessarily bars class certification. *See Dongelewicz*, 2004 WL 1661863 at *4 (App., *infra*, 9a); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir 1998) (adopting per se bar to class certification when statute of limitations defense depends on facts peculiar to each plaintiff's case); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982) (holding presence of affirmative defenses, such as statute of limitations, made certification inappropriate); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709, 719-20 (M.D. Pa. 1978) (class denied because of individualized statute of limitations defense); *see generally* Priya Laroia, *Individualized Affirmative Defenses Bar Class Certification--Per Se*, 2003 U. Chi. Legal F. 805 (2003) ("This disagreement has led to a circuit split in which the Fourth Circuit has found class certification erroneous if individualized affirmative defenses exist.").

The majority position holds to the contrary, as the court held in *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 385 (S.D.N.Y. 1996):

> The issues of each putative class member's lack of knowledge and due diligence may require individualized consideration.... Nevertheless, the majority of courts that have considered this issue have held that these

> individual issues do not preclude the certification of a class.

(Citing *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 42-43 (S.D.N.Y. 1990); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1044 (N.D. Miss. 1993); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 579 (E.D. Pa. 1984); *In re Independent Gasoline Antitrust Litig.*, 79 F.R.D. 552, 559 (D. Md. 1978). *See also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295-97 (1st Cir. 2000) (certification was appropriate under Rule 23(b)(3) even though the question of applicability of statute of limitations defense may have differed as to each class member); *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 752-53 (E.D.N.Y. 1986) (noting "courts have been nearly unanimous" in "holding that possible differences in the application of a statute of limitations to individual class members... does not preclude certification") (citations omitted).

This circuit split has developed, *inter alia*, from a difference in interpreting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), in which the Supreme Court held that it is improper to consider the merits of the case in adjudicating the class certification issue. *See, e.g., Weil v. Long Island Sav. Bank, FSB*, 200 F.R.D. 164, 173 (E.D.N.Y. 2001) (holding certification not barred by limitations defense because court should not consider merits) (citing *Harrison v. Great Springwaters of Am., Inc.*, 96-CV-5110, 1997 WL 469996, at *2 (E.D.N.Y. June 18, 1997), which cites *Eisen*, 417 U.S. at 178).

B. The issue is important and recurring because it is present whenever the statute of limitations defense is asserted in putative class actions, pursuant to Fed. R. Civ. P. 23.

The issue of whether an individualized statute of limitations defense bars class certification is fundamental to Fed. Civ. P. 23 since the defense of the statute of limitations is one of the most common affirmative defenses which is asserted in a large percentage of all cases. Consequently, the Supreme Court

should resolve this recurring issue in order to ensure the uniform and predictable adjudication of class actions.

C. The decision below is wrong because, *inter alia*: the appropriate remedy to solve any individualized issues would have been redefinition of the class period.

First, since "[t]his action is well-suited for class adjudication", as the district court held (App., *infra*, 74a), the appropriate remedy to solve any individualized issues pertaining to class certification was by redefining the class period, not decertification. *See, e.g., Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 38-42 (1st Cir. 2003) (holding class certification appropriate despite presence of individualized affirmative defenses because any differentiation as to affirmative defenses could be addressed by creation of subclasses or narrowing of defined class). Specifically, the district court could have simply defined the class period as including only injuries which took place within the limitations period, from May 27, 1994 to October, 1996, thereby obviating discovery issues.

In the alternate, the district court could have considered each class member's lack of knowledge and due diligence as part of the class member's damage claim. *See, e.g., In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. at 385 ("Instead, any individual questions concerning each putative class member's lack of knowledge and due diligence may be considered, if necessary, when the court addresses each putative class member's damage claim") (citations omitted). In certifying this case as a class action, the district court held that issues of injury could require individual proofs without barring certification:

> [I]f a violation of RICO is shown, each plaintiff will have to show that the violation caused injury to his or her property. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985). Although this may require individual proofs, that alone is not a sufficient basis for denying certification when common issues of liability predominate.

App., *infra*, 70a.

Second, in this case the statute of limitations is an issue common to the class because, *inter alia*, the injuries to be discovered were primarily to the common areas of the development, e.g., failure to complete maintenance because PNC embezzled the funds, etc. *See, e.g., In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993) (holding common questions predominate in analysis of fraudulent concealment and due diligence).

Third, the injury discovery rule does not present the accrual complexities of the injury plus pattern discovery rule which makes it more amenable to class certification, even if it is "stricter" with respect to the merits. It was erroneous for the Third Circuit to disregard the fact that the injury discovery rule is more amenable to class certification, even though it is "stricter" with respect to the merits, since inquiring into the merits of the case in adjudicating class certification is prohibited by *Eisen*. *See Eisen*, 417 U.S. at 177-78; *Dongelewicz*, 2004 WL 1661863 at *3-4 (App., *infra*, 7-9a).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

Appendix A – Opinion of the
United States Court of Appeals for the Third Circuit
Dated and Decided on July 23, 2004

NOT PRECEDENTIAL

UNITED STATES OURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1045

LEON R. DONGELEWICZ; MARGARET J. DONGELEWICZ, Husband and Wife; FRANCIS X. BURNS; LAURA BURNS; LOIS A. BURNS; GEORGE M. DE PERSIA; SHARON M. DE PERSIA, Husband and Wife; JOHN B. KNOX; BETSY C. KNOX, Husband and Wife; *ESTATE OF JOHN T. MIELE; FRANK J. RACHUBINSKI; HELEN A. RACHUBINSKI, Husband and Wife; SENTA M. SHERIDAN; GER D.J. SMIT; WACLAW SZCZESNIAK; DANUTA SZCZESNIAK, Husband and Wife, For Themselves and on Behalf of all Others Similarly Situated,

Appellants

v.

*PNC BANK NATIONAL ASSOCIATION, Successor by Merger to First Eastern Bank,** BANKSHARES REALTY COMPANY, Successor to First Eastern Corp.; FRANK M . CEDRONE; C.B.G. LIMITED, A Pennsylvania Limited Partnership; ONEIDA WATER COMPANY, A Company Organized Under the Laws of Pennsylvania; VALLEY UTILITIES COMPANY, INC., A Pennsylvania Corporation;

MLA MANAGEMENT ASSOC, A Pennsylvania Corporation; RALPH CONTE; ARLENE REINESS; THE PROPERTY OWNERS ASSOCIATION OF THE VALLEY OF LAKES, An Unincorporated Association

*(Amended Per Clerk's Order dated Janaury 17, 2003)

**(Amended Per Court Order dated April 23, 2003)

On Appeal from the United States District Court
for the Middle District of Pennsylvania

District Court Judge: The Honorable James F. McClure
(D.C. Civil No. 95-cv-00457)

Argued on January 26, 2004

Before: NYGAARD, FUENTES, and STAPLETON, Circuit Judges.

(Opinion Filed: July 23, 2004)

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OPINION OF THE COURT

FUENTES, Circuit Judge:

This appeal involves a real estate development known as Valley of the Lakes ("VOL") located near the Poconos in Hazleton, Pennsylvania and developed by CBG Limited ("CBG"), a Pennsylvania Limited Partnership. On June 17, 1994, Leon R. Dongelewicz and ten other sets of VOL lot owners ("Dongelewicz") commenced a class action against the owners and managers of VOL as well as First Eastern Bank, N.A., the development's primary source of financing, alleging years of fraud and broken promises.[1] As of the date of this appeal, First

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[1] We will refer to First Eastern Bank, N.A. and its parent, First Eastern Corporation, collectively, as "First Eastern." First Eastern was acquired by PNC Bank, N.A. and by an Order dated January 17, 2003, PNC was substituted for First Eastern. However, because the events at issue here occurred primarily before 2003, we will refer to the relevant party as First Eastern.

Eastern is the only remaining defendant.[2] Dongelewicz appeals a September 30, 1999 decision of the District Court which decertified the class action, granted summary judgment to First Eastern, and denied appellants' motion for leave to supplement the complaint. We agree with the District Court and affirm.

I. Background

The facts, as exhaustively recounted in Dongelewicz's 157-page complaint, are well known to the parties. We only discuss those that are relevant to our discussion of the issues on appeal. In September of 1986, CBG acquired VOL, a 4000 acre tract of land partially subdivided for residential and recreational development. From the registration of the lots in 1987 until about 1989, the VOL development did well, selling lots to individual purchasers and beginning to construct amenities. Potential lot purchasers were told that the development would eventually include roads, a central sewer system, an 18-hole golf course and "Lake Algonquin." Dongelewicz claims that CBG never intended to complete the promised amenities.

As CBG's primary source of financing, First Eastern Bank made its initial loans to CBG in 1988: a $5 million revolving development loan and a $2 million receivable line of credit. These amounts were increased and by the end of 1989, the Development Loan was at $11,500,000 and the Receivable Line at $10,000,000. The Development Loan was secured by a first mortgage on the property owned by CBG. The primary collateral for the Receivable Line were CBG's accounts receivable on notes secured by purchase money mortgages, ("Lot Paper") which lot owners in VOL provided to CBG when buying lots. CBG financed up to 90% of the lot price, and First Eastern advanced 90% of the financed amount to CBG. When mortgage

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[2] CBG, Frank Cedrone (a general partner of CBG), Oneida Water Company and Valley Utilities Company, Inc. (two CBG-related corporations that provided water and utilitites to VOL) defaulted, and MLA Management Associates, Inc. ("MLA"), Ralph Conte, Arlene Rainess, and the Property Owners Association of VOL settled with Dongelewicz.

payments were made to C&E Credit, the funds would be wired to First Eastern as payment on the receivable line.

Although First Eastern advanced the entire Development Loan to CBG, their inspectors found that the improvements described in the Property Reports filed by CBG with HUD were not completed by the dates specified in those reports. In November 1990, CBG failed to meet obligations under the terms of its loans from First Eastern because mortgagors were no longer making enough payments on CBG's purchase money mortgages for the receivables to constitute adequate payment on the receivable loan. CBG attempted to sell or re-finance the development with no success.

Dongelewicz contends that during this period between November 1990 and CBG's declaration of bankruptcy in 1992, First Eastern undertook a scheme to conceal the insolvency of CBG. VOL was having cash-flow difficulties and First Eastern made cash infusions and loans to CBG to keep the development alive and thereby preserve their collateral. Dongelewicz characterizes these actions as a scheme designed to allow CBG to appear solvent to purchasers, property owners, mortgagors, participant banks, bank regulators and HUD, and to continue to perpetrate its land fraud.

On March 30, 1992, CBG filed for Chapter 11 bankruptcy in the Middle District of Pennsylvania, claiming it was necessary in order to complete the development. CBG became debtor-in-possession, and entered into an agreement with MLA Management Associates to monitor their actions. Dongelewicz contends that, after CGB's declaration of bankruptcy, First Eastern concealed the income stream on the receivables from the Bankruptcy court, in effect siphoning millions of dollars of the bankruptcy estate's receivables. Dongelewicz also alleges that, during this period, First Eastern mailed out mortgage coupon booklets to the mortgagors, naming themselves and not CBG as payee, and hired MLA Management Associates to act as their representative at VOL to closely monitor the collection and expenditure of funds, and to develop a budget for CBG. In

response, First Eastern argues that the actions it took, including the cash advances and loans, were done to preserve its collateral and therefore provided for by an order of the bankruptcy court dated October 22, 1992.

In February 1995, CBG was removed as debtor-in-possession and a trustee was appointed. In 1996, a joint venture of Double Diamond Inc. and the Valley of the Lakes Civic Association ("VOLCA") acquired VOL. First Eastern had by this time been acquired by PNC, and PNC released its interests in VOL for less than $1,200,000, resulting in a loss of over $20 million.

On June 17, 1994, Dongelewicz commenced this action in the U.S. District Court for the District of New Jersey against CBG, Frank M. Cedrone, Oneida Water, Valley Utilities, First Eastern, MLA, Ralph Conte, and Arlene Rainess. On First Eastern's motion to dismiss, the District Court dismissed all counts except two, one filed pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 USC §§ 1961-1968, and the other filed under the common law of New Jersey for fraud and deceit. The case was thereafter transferred to the Middle District of Pennsylvania by a March 15, 1995 order. A class and subclasses were certified on June 19, 1996. About two years later, Dongelewicz filed a motion to supplement the Complaint asserting new RICO claims against First Eastern based on the allegation that during CBG's bankruptcy, the bank received mortgage payments due to CBG and fraudulently concealed receipt of those payments from the bankruptcy court.

On September 30, 1999 the District Court decertified the class action, granted summary judgment to First Eastern, and denied appellants' motion for leave to supplement the complaint. The District Court originally certified issues for an interlocutory appeal on February 8, 2000, however this court denied permission to appeal at that time. This court's jurisdiction is pursuant to a Fed.R.Civ.P. 54(b) certification issued by the District Court and 28 U.S.C. § 1291.

II. DISCUSSION

A. Leave to Amend and Supplement

We first address Dongelewicz's motion to amend the complaint to include allegations that the mortgage payments received by First Eastern from lot owners were fraudulently concealed from the bankruptcy court. (App 2341) The District Court denied Dongelewicz's motion to amend holding that the supplemental RICO claims were barred by the statute of limitations and therefore "amendment would be futile." (App 171) We review this decision for abuse of discretion.

The four-year statute of limitations for RICO claims begins to run when a plaintiff knew or should have known that he has been injured. Mathews v. Kidder, Peabody Co., 260 F.3d 239, 247 (3d Cir. 2001). In the proposed supplement, Dongelewicz alleges that First Eastern violated RICO, injuring the bankruptcy estate and the lot owners by receiving payments on the mortgage notes after CBG had filed for bankruptcy. These allegations do not arise from the same conduct alleged in the Complaint, so the supplement cannot relate back under Fed.R.Civ.P. 15(c)(2) to the date of filing. However, as the District Court found, all of the allegations made in the proposed supplement concern conduct which came to the attention of the lot owners over six years before they moved for leave to supplement in 1998. The supplemental claims were therefore untimely. The lot owners knew that CBG was in bankruptcy as of its filing on March 30, 1992. By April 1992, the lot owners' mortgage checks were made payable to and endorsed for deposit by First Eastern (App 5558-61), and the bankruptcy stay, which they now allege First Eastern was violating by cashing their checks, was issued on March 30, 1992. Because we agree that the supplemental claims were untimely, we affirm the District Court's denial of leave to amend.

B. Decertification

We review a class decertification for abuse of discretion. See Holmes v. Pension Plan of Bethlehem Steel Corp. 213 F.3d

124, 136 (3d Cir. 2000). Abuse of discretion is found "where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." Id. (internal quotation omitted)

The District Court decertified the class, holding that the application of the "injury plus pattern discovery rule," in evaluating the statute of limitations defense, would require individualized inquiries into differing factual circumstances and therefore decertification is appropriate. Under the injury plus pattern rule, the limitations period begins when the plaintiff knew or should have known that the defendant engaged in a pattern of racketeering activity and that the plaintiff was injured by the pattern of racketeering activity." See, e.g., Perlberger v. Perlberger, 1999 WL 79503, *3 (E.D. Pa. Feb. 12, 1999). Dongelewicz correctly notes that the injury plus pattern discovery rule is no longer the law in this circuit. Shortly after the District Court's decertification order, in Rotella v. Wood, 528 U.S. at 549 (2000), the Supreme Court abrogated the injury plus pattern rule and replaced it with the "injury discovery" rule of Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000), *cert denied*, 533 U.S. 929 (2001). Under the injury discovery rule, a RICO claim accrues when the plaintiff knew or should have known of his injury.

Dongelewicz argues that the injury discovery rule presents none of the complexities that led the District Court to decertify the class under the injury plus pattern rule. However, this argument defies common sense because, as the court explained in Forbes, the new rule "alter[s] the judicial landscape unfavorably to the plaintiffs from the shape in which it existed when this case was before the district court" and requires us to "consider the case under an accrual rule more adverse to plaintiffs than that the district court applied." 228 F.3d at 424. In fact, as First Eastern points out, the new rule may mean that all class members' claims are barred by the statute of limitations. Dongelewicz argues that even if the new rule is "stricter" than the old, it does not require the same individualized inquiry that

compelled the District Court to decertify, but there is no reason to believe that the District Court's conclusion regarding the need for individualized inquiry is no longer true under the new rule. Under the injury discovery rule, the court must still determine when each lot purchaser, by the exercise of diligence, should have discovered she was injured. With respect to the fraud claims, the District Court held that March 30, 1992 was the latest date any reasonable person would have discovered her injury. However, setting the precise date for each plaintiff, given the differing circumstances of their purchase and ownership of the lots, still requires an "extremely fact-specific" individualized inquiry. Mathews v. Kidder, 260 F.3d 239, 250 (3d Cir. 2001). The District Court's application of the injury discovery rule to the fraud claim is not an apt analogy here because, as this court explained in Mathews, "the focus of accrual in a RICO action is different from that for a fraud claim where the focus is on the acts of the defendants" which are common to all plaintiffs – "a RICO claim accrues when the plaintiffs should have discovered their injuries." Id, at 251. The District Court was well within its discretion decertifying the class in light of the statute of limitations defense, and that decertification remains valid under the new injury discovery rule.

C. Summary Judgment

1. RICO Claim

To establish a RICO violation under § 1962, plaintiffs must prove (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). To recover under civil RICO, an injury to plaintiff's business or property must have been proximately caused by the § 1962 violation. The "conducted the affairs of an enterprise" elements of § 1962(c) are satisfied by showing that a defendant "participate[d] in the operation of management of the enterprise itself." Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).

In granting summary judgment to First Eastern, the District

Court relied primarily on Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998). Rolo involved a residential land development scheme in which lot purchasers alleged that the developer, GDC, committed RICO predicate acts by making promises concerning future development they never intended to keep. The lot purchasers also sued secondary defendants, who were not alleged to have participated in the fraudulent sales, but were alleged to have enabled GDC to perpetuate its fraud by continuing to finance the development despite knowledge of the fraud, and by their concealment of it. Plaintiffs also alleged that the financiers, by doing the same sorts of things alleged against First Eastern here, had exercised control over the enterprise. The district court dismissed the complaint, finding that the activity did not constitute operation and management of the enterprise as required by Reves. We affirmed, holding that the allegations against the financiers made out an aiding and abetting claim, which was no longer viable after the Supreme Court's decision in Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

Dongelewicz is correct to point out that Rolo does not control here because although those facts are appealingly similar to those we face here, in that case, we did not discuss the District Court's ruling concerning the "operation and management" test. However, in his denial of motions for reconsideration, Judge McClure clarified his invocation of Rolo. He explained that he did not hold that Rolo controlled on the Reves issue, but rather noted that "First Eastern's role was analogous to that played by the 'secondary defendants' in Rolo" and held that "since First Eastern did not participate directly in the affairs of the enterprise and cannot be held civilly liable (under Rolo) as an aider and abettor, it cannot be liable."

In Univ. of Md. v. Peat, 996 F.2d 1534 (3d Cir. 1993), policyholders claimed that Peat's provision of accounting and other financial services to an insurer satisfied the Reves standard. We explained, however, that "[s]imply because one provides goods or services that ultimately benefit the enterprise does not

mean that one becomes liable under RICO as a result." Id, at 1539. We have also stated, albeit in the fraud context, that "we are unwilling to hold that merely because a lender requires security and approval of aspects of construction, the lender thereby takes 'control' of the project. To do so would wreak havoc on the lending industry, for any lender who reasonably wished to protect itself would be forced to run the risk of being sued for the unknown fraudulent acts of its borrowers." Bhatla v. U.S. Capital Corp., 990 F.2d 780, 778 (3d Cir. 1993). While it is certainly true that a major creditor of a corporation can have "substantial persuasive power" and some legal authority over management, alone, such power is "not equivalent to having the power to conduct or participate directly or indirectly in the conduct in the affairs of those corporations." Strong & Fisher Ltd. v. Maxima Leather, Inc., 1993 WL 22705, *1 (S.D.N.Y., July 22, 1993).

We agree with that analysis. First Eastern was merely a lender - it supplied financing for a development that failed, and then took steps to preserve its collateral. Such involvement does not support a finding that it "conducted" the affairs of any "enterprise" under Reves (be it CBG, VOL, or an association in fact of the various defendants). We therefore affirm the District Court's grant of Summary Judgment as to the § 1962(c) claims.

Although § 1962(c) was the focus of Dongelewicz' original claim, in this appeal his emphasis shifts. Based on the District Court's characterization of First Eastern's actions as "aiding and abetting", Dongelewicz argues that the bank's conduct violates § 1962(a) and § 1962(d).

Section 1962(a) prohibits the investment of income derived from a pattern of racketeering activity, by a "principal" in any racketeering activity that affects interstate or foreign commerce. Dongelewicz correctly notes that "principal" is defined in 18 U.S.C. § 2 as anyone who "aids, abets, counsels, commands, induces or procures" a RICO violation. However, contrary to Dongelewicz' assertions, the District Court did not err "as a matter of law," simply by granting summary judgment as to §

1962(a) while simultaneously noting that the evidence, at best, might be sufficient to establish aiding and abetting. Although First Eastern may have reinvested the income received from the Mortgages into VOL, the lot owners had contractual obligations to pay their mortgages, and such payments do not constitute the proceeds of racketeering activities.

Section 1962(d) of RICO makes it "unlawful to conspire to violate [§§ 1962(a), (b) or (c)]." In Smith v. Berg, 247 F.3d 532 (3d Cir. 2001), we adopted the Supreme Court's analysis in Salinas, which held that § 1962(c) liability is not a prerequisite to § 1962(d) liability. Rather, conspiracy liability under § 1962(d) does not require satisfaction of the Reves test, but is governed by the "general principles of criminal conspiracy law" which requires only that the defendant "share[s] a common purpose" with his co-conspirators and "knowingly agrees to facilitate a scheme, which includes the operation or management of a RICO enterprise." Smith 247 F.3d at 538. As First Eastern argued in its motion for summary judgment, the fact that First Eastern provided financing to CBG in no way gives rise to an inference (i) that First Eastern agreed to commit predicate acts; or (ii) that First Eastern knew that the predicate acts were part of racketeering activity, two necessary elements of a RICO conspiracy.

Dongelewicz additionally argues that the District Court erred as a matter of law because it erroneously imposed the "conducting the affairs of the enterprise" element of § 1962(c) onto § 1962(d). We agree with the District Court, however, that, at best, Dongelewicz "could prove nothing more than that First Eastern facilitated the conduct of CBG's business by providing financing, which it had a contractual obligation to do." This conduct does not violate § 1962(d). Accordingly, we agree with the District Court that "there is no evidence to support a claim that First Eastern directly participated in fraud or extortion…nor does it support a claim of conspiracy." We therefore affirm the District Court's decision on this issue.

2. Common Law Fraud Claim

The statute of limitations for fraud in Pennsylvania is two years. A claim accrues when injury is suffered and the statute begins to run when the injured person knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct. Ingenito v. AC&S, Inc., 633 A.2d 1172, 1174 (Pa. Super. 1993). Dongelewicz's primary fraud theory is that First Eastern failed to disclose the precarious financial condition of CBG to plaintiffs prior to CBG's bankruptcy. Even assuming *arguendo* that this claim could support a cause of action for fraud, we agree with the District Court that Dongelewicz and his fellow lot owners were injured when they purchased lots in VOL and their claims therefore accrued by 1990. Therefore, CBG's filing of bankruptcy on March 30, 1992 was the *latest* point at which the statute of limitations was triggered for all plaintiffs because it gave any reasonable person cause to know of the financial status of CBG and of the fact that First Eastern had not disclosed that financial status to Dongelewicz.

Dongelewicz relies on EBS v. Barclay's, 304 F.3d 302, 306 (3d Cir. 2002), but that case is not dispositive here. In EBS, we held that the filing of bankruptcy does not alert a reasonable plaintiff to the cause of the insolvency and does not trigger the running of the statute of limitations as to that fraudulent cause. Here, it is not the cause but the fact of the insolvency that is in issue – a fact that was allegedly concealed from the plaintiffs by the actions of First Eastern, but was made plain upon filing of bankruptcy.

Seeking to escape the statute of limitations problem, Dongelewicz suggests that, after CBG filed for bankruptcy, First Eastern engaged in a "massive bankruptcy fraud." To the extent that plaintiffs suggest that the statute of limitations with respect to their pre-bankruptcy failure to disclose claim should be tolled because an alleged fraud upon the bankruptcy court lulled them into not pursuing their claim, that argument fails. As the District Court noted, this alleged fraud would "not alter the notice of

financial troubles" plaintiffs received when CBG filed for bankruptcy and would not operate to conceal First Eastern's alleged failure to disclose CBG's financial condition to the lot owners before the bankruptcy. See Beauty Time, Inc. v. VU Skin Systems, Inc., 118 F.3d 140, 146 (3d Cir. 1997) (explaining the doctrine of fraudulent concealment).[3]

Dongelewicz has also suggested that, during CBG's bankruptcy, CBG and MLA made various misrepresentations to the lot-owners. Dongelewicz alleges that First Eastern had knowledge of these misrepresentations, but, as the District Court properly concluded, "plaintiffs' attempts to place liability for the actions of MLA [and CBG] on First Eastern based on agency simply are not supported by the record; 'approval' of an action is not agency." (App. 203.) Plaintiffs "had the burden of proving an agency relationship before [MLA's or CBG's] actions could be attributed to and binding on" First Eastern. Bolus v. United Penn Bank, 525 A.2d 1215, 1221 (Pa. Super. Ct. 1987). Simply put, Dongelewicz has not met that burden. No evidence of an agency relationship has been offered[4]

Accordingly, we agree with the District Court that First Eastern is entitled to summary judgment on Dongelewicz' claim

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[3] We do not examine whether any alleged "fraud upon the bankruptcy court" amounted to a new, actionable fraud claim. As we noted above in addressing the 1998 proposed supplement to plaintiffs' RICO claims, plaintiffs' complaint as filed does not allege such events or allegations with respect to First Eastern having engaged in a "fraud upon the bankruptcy court."

[4] Dongelewicz also briefly argues in his opening brief that mortgage coupon books mailed by C&E Credit to mortgagors amounted to fraud because they requested that payment be made to First Eastern Bank as opposed to CBG, thereby "misrepresenting" First Eastern as the entity mortgage payments were owed to. Additionally, Dongelewicz takes issue with one tax statement mailed to one mortgagor--detailing the amount of interest that mortgagor paid in 1993--because the statement indicated that it was from First Eastern Bank and not CBG. These theories of fraud, however, were not advanced in Dongelewicz's complaint. Of course, "a contention

(Cont'd)

of common law fraud and we therefore affirm.

III. CONCLUSION

For the reasons discussed above, we find that the District Court was within its discretion to deny Dongelewicz leave to file a supplement to the complaint and to decertify the class action. Furthermore, we find that the District Court properly granted summary judgment on Dongelewicz' RICO claims and correctly dismissed the fraud claim as untimely. We therefore affirm the judgment of the District Court in its entirety.

(Cont'd)
in a brief" "clearly . . . may not" be used to "substitute for an allegation in a complaint," Williams v. New Castle County, 970 F.2d 1260, 1266 n.4 (3d Cir. 1992), especially in the context of a fraud claim, which must be pled with particularity under Fed. R. Civ. P. 9(b).

Appendix B – Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, *Inter Alia,* Denying Petitioners' Motion to Supplement and Amend Complaint, Granting Respondents' Motion for Summary Judgment and to Decertify the Class Action, Dated September 30, 1999

80 F. Supp. 2d 339

United States District Court,
M.D. Pennsylvania.

Leon R. DONGELEWICZ, et al., Plaintiffs,
v.
FIRST EASTERN BANK, et al., Defendants.

No. 3:CV-95-0457.

Sept. 30, 1999.

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MEMORANDUM

MCCLURE, District Judge.

BACKGROUND:

On June 17, 1994, plaintiffs, lot owners in a recreational housing development called the Valley of Lakes, commenced this action with the filing of a complaint pursuant to: the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (Count I); the Interstate Lands Sales Full Disclosure Act, 15 U.S.C. § 1701 (Count II); 42 U.S.C. § 1983 (Count III); the New Jersey Real Estate Full Disclosure Act, N.J.S.A. § 45:15-16.47 (Count IV); and the common law of New Jersey for fraud and deceit (Count V). The complaint was filed in the United States District Court for the District of

New Jersey and was transferred to this court by Order of Court dated March 15, 1995.

Succinctly stated, plaintiffs allege a long history of mismanagement, broken promises, and fraud on the part of persons in ownership and management positions at Valley of Lakes over the years. Plaintiffs have been certified to proceed as a class pursuant to Fed.R.Civ.P. 23. Default has been entered against defendants Frank M. Cedrone, C.B.G., Ltd., Oneida Water Co., and Valley Utilities Co., Inc. The remaining defendants are First Eastern Bank, N.A., First Eastern Corp., MLA Management Associates, Inc., Ralph Conte, and Arlene Rainess Conte.

Before the court are a number of motions by the parties. We note at the outset that, due to the number of motions and the prolixity of the arguments, every argument and issue cannot possibly be addressed without production by the court of a massive memorandum. We therefore will restrict ourselves to the primary arguments raised, summarize as much as possible, and attempt to limit ourselves to the issues the resolution of which govern disposition of the motions.

DISCUSSION:

I. PLAINTIFFS' MOTION TO SUPPLEMENT AND AMEND COMPLAINT

Plaintiffs move to amend Count I of the complaint to add a number of transactions, events, and occurrences which either took place after the filing of the original complaint, or which occurred before the filing ***342** of the original complaint but about which plaintiffs did not learn until discovery. As discussed below, the RICO claims are barred by the statute of limitations, so that amendment would be futile. The motion will be denied.

II. MOTION FOR EXTENSION OF DEADLINES

Plaintiffs move for an extension of the deadlines for discovery, dispositive motions, and expert witness reports. The motion also seeks an order compelling responses from certain defendants to discovery requests from plaintiffs. The court's

computer docketing system shows the motion as still pending, despite its having been addressed in an order dated June 19, 1998 (record document no. 261), and the substance of the motion having been addressed in an order dated January 6, 1999 (record document no. 373). The motion will be denied as moot.

III. MOTIONS FOR DECERTIFICATION

Defendants move for decertification of the classes and sub-classes whose claims are asserted against the relevant moving defendant. Common to these motions is the assertion of a problem with the statute of limitations which renders the case unmanageable as a class action. We agree.

In certifying the class and various sub-classes, we relied in part on *Keystone Insurance Co. v. Houghton,* 863 F.2d 1125 (3d Cir.1988), in which the Third Circuit held that a cause of action under RICO accrues for purposes of the statute of limitations when the plaintiff knew or should have known that the elements of a cause of action existed. However, if further predicate acts which are part of the pattern of racketeering activity occur, the statute began to run from the date the plaintiff knew or should have known of the last such act.

In *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997), the Supreme Court held that the "last predicate act" method of accrual under RICO was not a proper interpretation of the statute. The Court declined, however, to establish a particular method of accrual as being appropriate. *See generally Rolo v. City Investing Co. Liquidating Trust,* 155 F.3d 644, 655-656 (3d Cir. 1998).

Since *Klehr* and *Rolo,* several courts in the Third Circuit have concluded that, while the "last predicate act" rule no longer applies, it continues to be the law of this circuit that the limitations period for a RICO claim begins to run when the plaintiff was aware of the elements of the RICO claim. That is, the period begins when the plaintiff knew or should have known that the defendant engaged in a pattern of racketeering activity and that the plaintiff was injured by the pattern of racketeering activity (the "injury plus pattern" rule). *See, e.g., Perlberger v.*

Perlberger, 1999 WL 79503, at *3 (E.D. Pa. Feb. 12, 1999) (Padova, J.); *Forbes v. Eagleson,* 19 F. Supp.2d 352, 357-358 (E.D. Pa.1998) (O'Neill, J.); *Gunter v. Ridgewood Energy Corp.,* 32 F. Supp.2d 166, 173 (D.N.J.1998) (Walls, J.).

The named plaintiffs in this case allege predicate acts which began in the 1970's and purportedly continue today. The times at which members of the class and sub-classes bought plots in the Valley of Lakes differ widely and the purchases were made with widely varying degrees of knowledge and sophistication.

For example, Leon and Margaret Dongelowicz purchased their lot in October of 1989, while George and Sharon DePersia bought two lots in 1975 and 1976. Clearly, a different analysis would apply to a person who buys based on a promise of a lake and golf course which do not occur when there is an extra 13-14 years to realize that these amenities have not appeared. Moreover, Francis Burns is a licensed real estate salesman who actually worked for CBG and sold lots in Valley of Lakes. Again, a different analysis would apply, as such a person would be expected to recognize ***343** false statements before an unsophisticated buyer.

Since the statute of limitations defense asserted by defendants plainly has merit, and plainly requires consideration of widely differing factual circumstances, we conclude that decertification of the class and sub-classes is warranted.

IV. FIRST EASTERN'S MOTION FOR SUMMARY JUDGMENT

A. Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*" Fed.R.Civ.P. 56(c) (emphasis added).

> ... [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery

> and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex* at 323, 106 S.Ct. 2548. He or she can discharge that burden by "showing ... that there is an absence of evidence to support the nonmoving party's case." *Celotex* at 325, 106 S.Ct. 2548.

Issues of fact are genuine "only if a reasonable jury, considering the evidence presented, could find for the non-moving party." *Childers v. Joseph*, 842 F.2d 689, 693-694 (3d Cir. 1988) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Material facts are those which will affect the outcome of the trial under governing law. *Anderson* at 248, 106 S.Ct. 2505. The court may not weigh the evidence or make credibility determinations. *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998). In determining whether an issue of material fact exists, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the non-moving party. *Boyle* at 393; *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988).

If the moving party satisfies its burden of establishing a

prima facie case for summary judgment, the opposing party must do more than raise some metaphysical doubt as to material facts, but must show sufficient evidence to support a jury verdict in its favor. *Boyle* at 393 (quoting, *inter alia, Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

B. Statement of Facts

Again due to the prolixity of the pleadings and other documents filed in this case, it is impossible to set forth a thorough recitation of the facts without defrosting a large portion of the continent. We therefore will attempt a statement which is more a summary of the facts, emphasizing those which are most pertinent to our disposition of the motion.

The Valley of Lakes real estate development began in the 1970's under the auspices of a company called High Vista, Inc. ***344** High Vista went bankrupt, and CBG[1] eventually assumed the role of developer. Throughout the time that Valley of Lakes has been in existence, potential purchasers of lots have been told that certain amenities would be built. These included "Lake Algonquin," an 18-hole golf course, roads, and central water and sewer systems. The amenities have not been completed, and plaintiffs claim that neither High Vista nor CBG ever planned to build them.

First Eastern was CBG's primary source of financing, eventually loaning over $20,000,000.00 for Valley of Lakes. There were two lines of credit involved. The first was a revolving development loan secured by a first mortgage on the property owned by CBG. The second was a receivable line of credit which

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[1] Plaintiffs repeatedly refer to one of the partners of CBG as a "Sicilian company." The company, according to plaintiffs, is headquartered in Torino, Italy. Not only is the company not involved in this litigation, so that it need not be named, we see no reason that the company cannot be referred to as an Italian company, except that "Sicilian" is intended to imply organized crime. Plaintiffs' repeated use of the term in this gratuitous manner is offensive.

operated with the sale of a lot by CBG and issuance of a purchase money mortgage which was collaterally assigned to First Eastern. CBG financed up to 90% of the lot price, and First Eastern advanced 90% of the financed amount to CBG and then collected on the notes through an agent.

In the early years (1987-1989) of CBG's management, Valley of Lakes did well both in the construction of amenities and in the sale of lots. With the downturn in the economy after 1990, however, lot sales declined and CBG encountered financial difficulties. CBG failed to meet its obligations to First Eastern, and attempted to re-finance or sell the development. At the same time, First Eastern made cash infusions into the project and took other actions to ensure that the development did not collapse due to cash flow difficulties.

When neither a buyer nor a financier appeared, CBG filed a petition in bankruptcy under Chapter 11. *See In re C.B.G. Ltd.*, 150 B.R. 570 (Bkrtcy. M.D. Pa.1992).[2] CBG became debtor-in-possession, and in that status entered into an agreement with MLA Management Associates, Inc., to monitor CBG's actions as debtor-in-possession. During the bankruptcy, First Eastern made advances to CBG to preserve its collateral, an action for which an order of the bankruptcy court dated October 22, 1992, provided. However, First Eastern took no action which would cause it to undertake any obligation as the owner or developer of the project.

In February, 1995, CBG was removed as debtor-in-possession and a trustee was appointed. In 1996, a joint venture of Double Diamond, Inc., and the Valley of Lakes Civic Association (VOLCA), an association of lot owners, acquired CBG's ownership interest. In the meantime, First Eastern merged with PNC Bank, which released its, interests in Valley of Lakes for approximately $1.2 million. The release resulted in losses to First Eastern/PNC of well over $20 million.

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[2] The only published opinion in the case is *In re C.B.G. Ltd.*, 150 B.R. 570 (Bkrtcy. M.D. Pa. 1992).

Presently, Double Diamond and VOLCA have made progress on the infrastructure of Valley of Lakes, and lots are selling once again.

C. RICO Claim

To recover in a civil RICO action, a plaintiff must prove: (1) a violation of 18 U.S.C. § 1962; (2) an injury to the plaintiff's business or property; and (3) that the RICO violation was the proximate cause of the injury. *Perlberger v. Perlberger,* 32 F. Supp.2d 197, 201 (E.D. Pa. 1998) (citing *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 265-268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)), *vacated in part and modified in part on other grounds,* 34 F.Supp.2d 282 (E.D.Pa.1998). To establish a violation of § 1962, the ***345** plaintiff must prove: (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). A "pattern of racketeering activity" is the occurrence of at least two acts of racketeering activity, known as predicate acts and enumerated in the statute, within a period of ten years. *Id.* (citing 18 U.S.C. § 1961(5); *Sedima* at 496 n.14, 105 S.Ct. 3275).

The problem with plaintiffs' claims against First Eastern is that the record does not support a finding that it "conducted" the affairs of an enterprise.

Actually, as First Eastern points out, its role is analogous to the role played by the "Financing Defendants," the "Mortgagee Defendants," and the "Lot Contract Defendants" in *Rolo v. City Investing Co. Liquidating Trust,* 155 F.3d 644 (3d Cir. 1998). In that case, the various defendants so categorized provided financing for a real estate development project in Florida which, like Valley of Lakes, encountered financial difficulties. Succinctly stated, the Third Circuit characterized their role as, at most, aiders and abettors of the scheme rather than as participants in the scheme or members of the enterprise, or even as co-conspirators. Since there is no liability for aiding and abetting a RICO violation, the district court's dismissal of the claim was affirmed. *Rolo* at 657.

As in *Rolo*, plaintiffs' allegations here do not amount to more than aiding and abetting, since there is no evidence to support a claim that First Eastern directly participated in fraud or extortion, the purported predicate acts, nor does it support a claim of conspiracy. Despite the many trees felled in the effort to create a record reflecting the contrary, in the end, plaintiffs can prove nothing more than that First Eastern facilitated the conduct of CBG's business by providing financing, which it had a contractual obligation to do. It did not itself "conduct" the affairs of CBG, Valley of Lakes, or any other entity that, under these circumstances, may be considered an "enterprise" for RICO purposes. Under *Rolo*, that simply does not give rise to RICO liability.

Summary judgment on the claims under RICO will be entered in favor of First Eastern.

D. Common Law Fraud Claim

Plaintiffs' common law fraud claims are based on the failure of First Eastern to disclose the precarious financial condition of CBG, a fact which prevented the completion of the development. The statute of limitations for a claim of fraud in Pennsylvania is two years. 42 Pa.Cons.Stat.Ann. § 5524(7). A claim accrues when the injury is suffered, and the statute begins to run when the plaintiff knows, or reasonably should know, that he or she has been injured and that the injury was caused by the conduct of another. *Pitts v. Northern Telecom, Inc.*, 24 F. Supp. 2d 437, 440-441 (E.D. Pa. 1998) (summarizing Pennsylvania law).[3]

The named plaintiffs all bought their lots by 1990, so that their claims had accrued by that time. CBG's bankruptcy petition

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[3] Although the complaint states that the common law fraud claim is under New Jersey law, we believe that the law of Pennsylvania would govern because the tangible property which is the subject of the parties' transactions is land, and the land is located within Pennsylvania. *See* Restatement (Second) of Conflict of Laws, § 148(2)(e) and comment *i*. *Cf. Continental Casualty Co. v. Diversified Industries, Inc.*, 884 F. Supp. 937, 952 n.15 (E.D. Pa. 1995) (Pennsylvania law governed counterclaim against insurers

(Cont'd)

was filed on March 30, 1992, an event which would give any reasonable person cause to know of the financial status of CBG and the likelihood of any substantial expenditure on infrastructure. Plaintiffs' complaint was not filed until ***346** June 17, 1994, after the limitations period had expired.

First Eastern is entitled to summary judgment on plaintiffs' claim of common law fraud.

V. MLA'S MOTION FOR SUMMARY JUDGMENT

MLA moves for summary judgment because (1) its actions were "within the scope of the Order of 22 October 1992" (a stipulation and plan for reorganization for CBG approved by the bankruptcy court on that date) and (2) *res judicata,* also called claim preclusion, bars plaintiffs from pursuing issues and claims arising under the bankruptcy court's order.

Unfortunately, MLA's brief in support of its motion is a terse document which does not fully set forth reasons warranting the grant of summary judgment. The "Argument" section of the brief is somewhat less than three pages of numbered paragraphs simply denying liability.

As to its conduct being "within the scope" of the bankruptcy court's order, we are not sure precisely what MLA means. An order allowing it to act as an agent of the debtor does not somehow insulate MLA from liability for tortious activity in that capacity, and to say that its conduct was "within the scope" of the bankruptcy order does not mean that the bankruptcy court approved the conduct.[4]

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for misrepresentation because, *inter alia,* subject of insured risk was remediation site located in Pennsylvania). Plainly, Pennsylvania has an overriding interest in the application of its law to real estate transactions involving land within its borders.

[4] For example, the bankruptcy court order allowed MLA to assist in the collection of fees due to CBG. This would not give MLA the authority to break into houses and take the money, though such conduct would be "within the scope" of its collection authority.

As to MLA's argument concerning the *res judicata* effect of the bankruptcy court's order, the cases it cites refer to separate proceedings initiated by a creditor, debtor, or party in privity when the claims were not asserted in the plan of reorganization. *See, e.g., Heritage Hotel Ltd. Partnership I v. Valley Bank of Nevada (In re Heritage Hotel Partnership I),* 160 B.R. 374 (9th Cir. BAP 1993) (general partner in Chapter 11 debtor barred from asserting lender liability claims which were derivative of debtor's pre-petition claims against creditor), *aff'd,* 59 F.3d 175 (9th Cir. 1995) (table); *Francis v. Holmes Land Co. (In re GEX Kentucky, Inc.,* 100 B.R. 887 (Bkrtcy. N.D. Ohio 1988)) (creditor who voted to accept reorganization plan barred from bringing separate complaint fo. equitable subordination of claims). *See also Cohen v. De La Cruz (In re Cohen),* 106 F.3d 52 (3d Cir. 1997) (statutory exception to dischargeability (and therefore to *res judicata*) applies to claims for fraud and false pretenses), *aff'd,* 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). An order cannot constitute *res judicata* for claims which have not yet accrued, and the claims asserted against MLA relate to conduct occurring after issuance of the order of the bankruptcy court.

The arguments as asserted by MLA do not justify the granting of summary judgment in its favor.

VI. ARLENE CONTE'S MOTION FOR SUMMARY JUDGMENT

Defendant Arlene Conte moves for summary judgment with respect to the sole claim against her, the RICO claim.

As a preliminary matter, plaintiffs contend that the motion should be deemed withdrawn pursuant to LR 7.5 of the Local Rules for the Middle District of Pennsylvania because the brief in support of the motion was not filed until September 29, 1998, after the motion was filed September 15, 1998. LR 7.5 provides for the filing of a brief in support 10 days after the filing of a motion. Under Fed. R. Civ. P. 6(a), when a local rule provides

for a time period of less than 11 days, intervening weekends and holidays are excluded in the computation of the period. The brief in support of the motion was timely filed.

Turning to the merits of the motion, we agree with Arlene Conte that the record does not support plaintiffs' contention that ***347** she was "associated" with a RICO enterprise. The allegations against her center on the purchase of a lot and house in Valley of Lakes with her cousin, John T. Miele. According to plaintiffs, the house was shown to Miele while it still was owned by Rocco and Ingrid Messina. Arlene Conte co-signed the loan documents and deed with Miele, and the two were named as joint tenants with right of survivorship. The house was purchased by Paul Malone Associates from the Messinas for $45,000.00, and Paul Malone Associates then sold the house to Miele and Conte for $55,000.00. Defendant Cedrone is a partner in Paul Malone Associates.

There are, of course, several rather obvious problems with plaintiffs' allegations. First, Arlene Conte is not a partner in Paul Malone Associates, and plaintiffs have produced no evidence that Arlene Conte knew anything about the purchase from the Messinas by Paul Malone Associates. Arlene Conte also was neither a principal nor an employee of CBG. In fact, in co-signing with Miele, Arlene Conte made herself responsible for the inflated purchase price.

To counter the rather glaring absence of evidence, plaintiffs point to a number of factors which they contend render Arlene Conte an associate of the RICO enterprise. First, they point to the fact that Arlene Conte first lived with, then married, Ralph Conte, one of the alleged principals of the alleged enterprise. They also point out that Arlene Conte "knew" Cedrone and Thomas Hawk of First Eastern's predecessor in interest.

Stated bluntly, plaintiffs' allegations in this regard border on the ludicrous. That a party "knows" someone who may be part of an enterprise hardly "associates" that party with the enterprise. The same is true of the fact that Arlene Conte lived with and later married Ralph Conte. Marriage to a person who

is part of a RICO enterprise does not render the spouse liable.[5]

At most, plaintiffs' allegations and evidence may support a claim for a single instance of fraud, not RICO. Arlene Conte's motion for summary judgment will be granted.

VII. RALPH CONTE'S MOTION FOR SUMMARY JUDGMENT OR FOR PARTIAL SUMMARY JUDGMENT

Defendant Ralph Conte moves for summary judgment on Counts I (RICO), II (Interstate Land Sales Full Disclosure Act), and Count IV (New Jersey Estate Sales Full Disclosure Act). Plaintiffs again make an argument concerning the date of the filing of the brief in support of the motion for summary judgment, and we reject the argument for the same reasons recited with respect to Arlene Conte's motion for summary judgment.

With respect to Count I, the statute of limitations defense discussed with respect to First Eastern's motion for summary judgment applies as well to Ralph Conte's motion.

With respect to Count II, the activities prohibited under the Interstate Land Sales Full Disclosure Act are set forth in 15 U.S.C. § 1703(a)(1), (2). A three-year limitations period applies to actions brought under § 1703(a)(1), (a)(2)(D). 15 U.S.C. § 1711(a)(1). The limitations period runs from the date a contract of sale or lease is signed. *Id.* All of the named plaintiffs bought their lots prior to June 17, 1991, or more than three years before the date the complaint was filed.

A three-year limitations period also applies to actions brought under § 1703(a)(2)(A), (B), (C), but with an additional proviso that the period begins to run from the date of discovery of the violation, or the date on which the discovery should ***348** have been made by the exercise of reasonable diligence. 15 U.S.C. § 1711(a)(2). Ralph Conte argues that no conduct on

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[5] This remarkable concept would become even more fascinating in the context of criminal RICO enterprises, in which the concept of a "crime family" would be broadened considerably and include the innocent family and friends of any organized crime figure.

his part implicates the tolling provision. However, the statute does not refer to any conduct on the part of an individual defendant; it tolls the limitations period until the plaintiff reasonably can discover the violation, regardless of the defendant's intervening conduct.

Ralph Conte also argues that plaintiffs cannot prove detrimental reliance on any alleged misrepresentation or material omission on his part. Plaintiffs cite, *inter alia, Hoffman v. Charnita, Inc.*, 58 F.R.D. 86 (M.D. Pa. 1973), for the proposition that reliance is not an element of a claim under § 1709. The problem with plaintiffs' argument is that §1709 has been amended.

The version of § 1709 which was analyzed in *Hoffman* read in part as follows:

> Any developer or agent, who sells or leases a lot in a subdivision *** (2) by means of a property report which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

Hoffman at 89 (quoting 15 U.S.C. § 1709(b), since amended).

Judge Herman of this court found this language to be analogous to § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771, under which a buyer of securities need not prove reliance on a material misrepresentation or omission in an action against the seller. *Id.* at 90. Based on the similarity, Judge Herman concluded that a plaintiff need only prove a material misrepresentation or omission from a property report to recover under § 1709(b)(2).

Since the amendment, however, the language is no longer similar. Section 1709 now provides, "A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title...." 15 U.S.C. § 1709(a). Making an untrue statement of fact or omitting a material fact from a property report, as well as providing advertising materials containing information inconsistent with that required to be disclosed in the property

report, is prohibited under § 1703(a)(1)(C), (D), i.e. two of the provisions for which an action is time-barred.

The provisions under which plaintiffs may proceed in this case, § 1703(a)(2)(A), (B), (C), are separate matters, however. Subparagraphs (A) and (C) relate to the employment of fraudulent means in making the sale, and therefore would require detrimental reliance. The proscription described in subparagraph (B) is not limited to making a false statement or material omission, but involves obtaining money or property by such means and involves examining the circumstances of the overall offer and sale or lease, as relates to any material information. In other words, subparagraphs (A), (B), and (C) prohibit fraud. Since establishing fraud requires proof of detrimental reliance, plaintiffs are required to so prove in this instance.

We recognize that there is a split in authority as to whether a claim of fraud under the Act requires evidence of reliance. *See, e.g., Prebil v. Pinehurst, Inc.*, 638 F. Supp. 1314, 1317 n.1 (D. Mont. 1986) (noting split and citing cases); *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327, 1336 and 1336 n.22 (D.S.C. 1992) (also noting split and indicating that plaintiff need not show reliance on an omission but must show reliance on a misrepresentation if claim brought under § 1703(a)(2)(B)). However, we believe that the language of the statute is to the effect that simply making a material misrepresentation or omission in a document required to be prepared and/or provided under the Act is actionable under §§ 1709, 1703(a)(1), and does not require proof of reliance, while fraud under § 1703(a)(2) requires proof of reliance.

***349** However, the question is not limited to reliance on statements made directly by the seller to the purchaser, since a developer or agent may be liable for fraud committed "directly or indirectly" under § 1703(a). Thus, if Ralph Conte was responsible for false statements placed in advertising or which otherwise was made public and reached a buyer, and the buyer relied on that information, Ralph Conte may be liable.

Ralph Conte has not provided reference to facts of record which would require a finding that no statement attributable to him was relied upon by the named plaintiffs. His motion for summary judgment[6] will be denied insofar as it refers to the

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[6] Ralph Conte also seeks, as an alternative to summary judgment, "summary adjudication." We are not clear precisely what Conte means by that term, which is not in Black's Law Dictionary. A limited search of the WESTLAW electronic database provides some insight. Apparently, "summary adjudication" is the process of resolving a claim or dispute without the full panoply of procedural protections. Based on the rights to due process and to trial by jury, the instances in which "summary adjudication" is permissible are limited. For instance, petty, direct contempt of court is subject to "summary adjudication" to protect the integrity of the judicial process. *Int'l Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 832, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). *See also Levine v. United States,* 362 U.S. 610, 617-618, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) (contempt in grand jury proceedings subject to summary adjudication). Also, a governmental entity may be entitled to take some action against an individual with diminished due process protections if its interest in "summary adjudication" outweighs the individual's interest. *Goldberg v. Kelly,* 397 U.S. 254, 261, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (but finding procedures for termination of welfare benefits to be inadequate because governmental interest did not outweigh welfare recipient's interest in benefits). Of course the obverse also may be true. *Phelps v. United States,* 421 U.S. 330, 332-333 and n. 2, 95 S.Ct. 1728, 44 L.Ed.2d 201 (1975) (government's interest in tax lien outweighed petitioner's interest in summary adjudication of tax claim by bankruptcy court, so that government was entitled to plenary proceeding). Apparently because the need for a full trial to a jury is obviated, the granting of summary judgment is a form of summary adjudication. *See Harbor Tug and Barge Co. v. Papai,* 520 U.S. 548, 552, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997) (when district court granted motion for summary judgment in Jones Act case because plaintiff was not a "seaman" under that Act, its later order confirmed the "summary adjudication" of plaintiff's non-seaman status); *In re School Asbestos Litigation,* 977 F.2d 764, 794 (3d Cir.1992) (party that fails to file timely motion for summary judgment waives right to summary adjudication).

In this instance, apart for summary judgment, Ralph Conte fails to cite the form of "summary adjudication" to which he purports to be entitled, nor any basis (whether factual or in the Federal Rules of Civil Procedure) for the same.

Interstate Land Sales Full Disclosure Act.

Ralph Conte also moves for summary judgment on Count IV of the complaint, which sets forth a claim under the New Jersey Real Estate Sales Full Disclosure Act. Conte argues that plaintiffs are not entitled to recover under the New Jersey Planned Real Estate Development Full Disclosure Act, a separate provision. Conte has not shown that he is entitled to judgment on Count IV of the complaint.

VIII. CONCLUSION

Plaintiffs' motion to supplement and amend the complaint will be denied as futile because the RICO claim is time-barred regardless of the amendment. Plaintiffs' motion for extension of deadlines has been addressed and is moot, and will be denied for statistical purposes. Defendants' various motions for decertification of the class and sub-classes will be granted based on the widely varying factual analyses necessary to evaluate the statute of limitations defense.

First Eastern's and Arlene Conte's motions for summary judgment will be granted. MLA's motion for summary judgment will be denied. Ralph Conte's motion for summary judgment will be granted in part and denied in part.

***350** Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEON R. DONGELEWICZ, et al., Plaintiffs,

v.

FIRST EASTERN BANK, et al., Defendants.

No. 3:CV-95-0457.

(Judge McClure)

NOTICE OF DECERTIFICATION OF CLASS ACTION

TO: All persons in the Primary Class and the four Subclasses described below who have not previously opted out of this class action litigation.

On June 17, 1994, the plaintiffs in this action, being Leon R. Dongelewicz, Margaret J. Dongelewicz, Francis X. Burns, Laura Burns, Lois A. Burns, George M. De Persia, Sharon M. De Persia, John B. Knox, Betsy C. Knox, John T. Miele, Frank J. Rachubinski, Helen A. Rachubinski, Senta M. Sheridan, Ger D.J. Smit, Waclaw Szczesniak, and Danuta Szczesniak, filed a complaint in the United States District Court for the District of New Jersey. The complaint alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act, the Interstate Land Sales Full Disclosure Act, and the New Jersey Real Estate Full Disclosure Act, and that the defendants committed fraud and deceit. The defendants are First Eastern Bank, N.A., First Eastern Corporation, Frank M. Cedrone, C.B.G. Limited, Oneida Water Company, Valley Utilities Company, Inc., MLA Management Associates, Inc., Ralph Conte, and Arlene Conte. First Eastern Bank, N.A., and First Eastern Corporation now are part of PNC Bank, N.A. The case was transferred to the United States District Court for the Middle District of Pennsylvania because the subject of the litigation, a real estate development called The Valley of Lakes, is located in the Middle District.

Previously, the court ruled that the case should be maintained as a class action under Rule 23 of the Federal Rules of Civil

Procedure. The Primary Class and four Subclasses were defined as follows:

1. ***Primary Class:*** "All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in The Valley of Lakes subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania."

with respect to the following cause(s) of action: Any claims for damages or injunctive relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), premised upon the alleged racketeering activity of defendants PNC Bank, N.A., by merger with First Eastern Bank, N.A., First Eastern Bank Corp., a subsidiary of PNC Bank Corp., C.B.G. Ltd., Frank Cedrone, Valley Utilities Co., Inc., Oneida Water Co., MLA Management Associates, Inc., Ralph Conte, Arlene Conte, and the Property owners Association of The Valley of Lakes, an association whose board members are George Denke, Jr., Dianne French, Ronald Kichline, and Thomas Peirson, relating to The Valley of Lakes development.

2. ***Subclass A:*** "All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 20, 1986, have purchased unimproved lots, in The Valley of Lakes subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania."

with respect to the following cause(s) of action: Any claims for damages or injunctive relief under the Interstate Land Sales Full Disclosure Act (Land

Disclosure *351 Act), 15 U.S.C. § 1701, against defendants C.B.G. Ltd., Frank Cedrone, or Ralph Conte premised upon the sale of unimproved lots in The Valley of Lakes subdivision.

3. ***Subclass B:*** "All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have owned lots, whether improved or unimproved, in The Valley of Lakes subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania."

with respect to the following cause(s) of action: Any claims for damages or injunctive relief under 42 U.S.C. § 1983 against defendant C.B.G. Ltd., Frank Cedrone, Property Owners Association (POA), or MLA Management Associates, Inc., premised upon the defendants' alleged deprivation of property interests and/or liberty interests under color of statute, ordinance, regulation, or usage relating to The Valley of Lakes subdivision.

4. ***Subclass C:*** "All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in The Valley of Lakes subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania, based on (a) any offer or disposition made in or from the State of New Jersey; or (b) any offer directed by the developer or its agent originating from outside the State of New Jersey to the persons or entities within the State of New Jersey."

with respect to the following cause(s) of action: Any claims for damages or injunctive relief under the New

Jersey Real Estate Sales Full Disclosure Act, N.J.S.A. § 45:15-16.47, against defendants C.B.G. Ltd., Frank Cedrone, or Ralph Conte, relating to The Valley of Lakes subdivision.

5. ***Subclass D:*** "All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in The Valley of Lakes subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania."

with respect to the following cause(s) of action: Any claims for damages or injunctive relief under a claim for common law fraud and deceit pursuant to the law of the State of New Jersey against PNC Bank, N.A., by merger with First Eastern Bank, N.A., First Eastern Bank Corp., a subsidiary of PNC Bank Corp., MLA Management Associates, Inc., C.B.G. Ltd., Frank Cedrone, Valley Utilities Co., Inc., and Oneida Water Company relating to The Valley of Lakes subdivision.

However, the court further ordered that the class certification was provisional and was subject to change in light of further developments in the case.

On September 30, 1999, on application of the defendants, PNC Bank, N.A., MLA Management Associates, Inc., Arlene Conte, and Ralph Conte, the court determined that the claims of the members of the Primary Class and the four Subclasses involved varying factual matters and should no longer be maintained as a class action. As a result of this determination the court decertified the Primary Class and four Subclasses, thereby removing the members of each from this suit. Therefore, all persons or entities who are members of the above-described Primary Class and/or one of the four Subclasses who may

possess claims against the named defendants related to the purchase and/or ownership of a lot or lots in The Valley of Lakes subdivision are no longer parties to this suit and cannot advance their claims in the context of this suit.

***352** Accordingly, you are hereby notified that your interests are no longer being represented in this lawsuit by the plaintiffs or their counsel. However, if you are a member of the Primary Class and/or one of the four Subclasses described above, and you believe that you have a claim or claims against one or more of the named defendants relating to the purchase and/or ownership of a lot or lots in The Valley of Lakes, you may still attempt to pursue your claim, pursuant to one of the statutes or common law recited above, by filing a complaint.

If you choose to pursue such a claim, you should be aware that the claim may be subject to prior rulings by the court, or to defenses such as the expiration of the statute of limitations, which already has been asserted successfully as to some claims in this case. Due to the complicated nature of the case, it would be advisable for you to contact an attorney before attempting to pursue your claims in court.

A copy of the Memorandum and Order of Court decertifying the Primary Class and the four Subclasses is available, for a fee, from:

Clerk of Court
U.S. District Court
Federal Building
240 West Third Street
P.O. Box 608
Williamsport, PA 17701
(570)323-6380

Nothing in this Notice is to be construed as an expression of the belief of the court as to the likelihood of success in obtaining relief or as to the merits of any claim(s) which a member of the now-decertified Primary Class or Subclasses may assert. This notice is intended merely to advise you of the decertification of the Primary Class and four Subclasses due to

the effect of the decertification on the members of the Primary Class and four Subclasses.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEON R. DONGELEWICZ, et al., :
Plaintiffs, : No. 3:CV-95-0457
: (Judge McClure)
v. :
:
FIRST EASTERN BANK, et al., :
Defendants. :

FILED
WILLIAMSPORT, PA
SEP 30 1999
MARY E. D'ANDREA, CLERK
PER s/ bp
DEPUTY CLERK

ORDER

September 30, 1999

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT:**

1. Plaintiffs' motion (record document no. 252) to supplement and amend the complaint is denied.

2. Plaintiffs' motion (record document no. 254) for an extension of the deadlines for discovery, dispositive motions, and expert reports and for an order compelling MLA Management Associates to comply with discovery requests is denied as moot.

3. First Eastern's motion (record document no. 271) to decertify the primary class and subclass D is granted.

4. First Eastern's motion (record document no. 275) for summary judgment is granted.

5. MLA's motion (record document no. 278) for summary judgment is denied.

6. MLA's motion (record document no. 280) to decertify the primary class is granted.

7. Arlene Conte's motion (record document no. 281) for summary judgment is granted.

8. Ralph Conte's motion (record document no. 283) for decertification is granted.

9. Arlene Conte's motion (record document no. 285) for decertification is granted.

10. Ralph Conte's motion (record document no. 286) for summary judgment is granted in part and denied in part, as follows:

(a) The motion is granted as to Count I and Count II insofar as the latter is asserted under 15 U.S.C. §§ 1709, 1703(a)(1), 1703(a)(2)(D); and

(b) The motion is denied as to Count IV and Count II insofar as the latter is asserted under 15 U.S.C. §§ 1709, 1703(a)(2)(A), (B), (C).

11. Counsel for plaintiffs shall, within twenty (20) days, send by first class mail, postage prepaid, to all persons provided with a copy of the notice of class action who were not subsequently excluded from the class a copy of the form of notice attached hereto as Appendix A.

12. Counsel for plaintiffs shall, within ten (10) days after effecting said mailing, file and serve a certificate as to the mailing of the notice, including a list of the addressees, setting forth both names and addresses.

13. The clerk shall defer entering judgment on behalf of any party until further order of court upon final disposition of the entire case.

14. The case is placed on the court's January 2000 Williamsport trial list.

15. Jury selection will be January 3, 2000, at 9:30 a.m., Fourth Floor, Federal Building, 240 West Third Street, Williamsport, Pennsylvania.

16. A final pretrial conference will be held on December 31 1999, at a time to be announced, in Chambers, Fourth Floor, Federal Building, 240 West Third Street, Williamsport, Pennsylvania.

17. All motions in limine shall be filed on or before November 16, 1999, with supporting briefs attached. All opposing briefs shall be filed on or before November 30, 1999. No reply briefs are permitted.

s/ James F. McClure, Jr.
United States District Judge

Appendix C – Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, *Inter Alia*, Denying Petitioners' Motion for Reconsideration and Certifying Issues For Interlocutory Appeal, Dated February 8, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEON R. DONGELEWICZ, et al., :
Plaintiffs, : No. 3:CV-95-0457
: (Judge McClure)
v. :
:
FIRST EASTERN BANK, et al., :
Defendants. :

FILED
WILLIAMSPORT, PA
FEB 8 2000
MARY E. D'ANDREA, CLERK
PER s/ bp
DEPUTY CLERK

MEMORANDUM

February 8, 2000

BACKGROUND:

On June 17, 1994, plaintiffs, lot owners in a recreational development called the Valley of Lakes, commenced this action with the filing of a complaint pursuant to: the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.

§§ 1961-1968 (Count I); the Interstate Lands Sales Full Disclosure Act, 15 U.S.C. § 1701 (Count II); 42 U.S.C. § 1983 (Count III); the New Jersey Real Estate Full Disclosure Act, N.J.S.A. § 45:15-16.47 (Count IV); and the common law of New Jersey for fraud and deceit (Count V). The complaint was filed in the United States District Court for the District of New Jersey and was transferred to this court by Order of Court dated March 15, 1995.

Succinctly stated, plaintiffs allege a long history of mismanagement, broken promises, and fraud on the part of persons in ownership and management positions at Valley of Lakes over the years. Plaintiffs were certified to proceed as a class pursuant to Fed. R. C. P. 23, and default has been entered against defendants Frank M. Cedrone, C.B.G., Ltd., Oneida Water Co., and Valley Utilities Co., Inc. The remaining defendants are First Eastern Bank, N.A., First Eastern Corp., MLA Management Associates, Inc., Ralph Conte, and Arlene Rainess Conte.

On September 30, 1999, the court issued a memorandum and order addressing a number of motions by the parties. Dongelewicz v. First Eastern Bank, No. 3:CV-95-0457, 1999 WL 1293030 (M.D. Pa. Sept. 30, 1999). Before the court are motions for reconsideration filed by plaintiffs and defendant MLA Management.

DISCUSSION:

I. PRELIMINARY MATTERS

In an Order of Court dated October 13, 1999, we placed limitations on the motions for reconsideration. Among those limitations were a 25-page limitation on briefs and compliance with our Local Rule concerning typeface. Apparently considering these limitations overly confining, plaintiffs have filed two briefs (brief in support of the motion and reply brief) of 25 pages, using a proportional font plainly intended to squeeze as much typeface as possible onto a page. Compare Plaintiffs' Motion for Reconsideration (employing an appropriate, Roman-

style font) with Plaintiffs' Brief in Support of Motion for Reconsideration (employing the much smaller type).[1] This conduct must be viewed in the context of the letter addressed to the court by plaintiffs' counsel, demonstrating dissatisfaction with our prior memorandum.

Simply stated, such behavior will not be tolerated. In the future, any motion, brief, memorandum, etc., prepared by plaintiffs' counsel for filing with the court must be in courier font.

In our prior memorandum, we noted that several courts have held that the "injury plus patte n" rule continues to be the law of the Third Circuit, and applies to determine the date a RICO cause of action accrues. Since issuance of our memorandum, the Third Circuit has so held. Annuli v. Panikkar, No. 98-7449, slip op. at 8-9, 1999 WL 1268123, at *4 (3d Cir. Dec. 30, 1999). We believe that the opinion in Annuli confirms our disposition of defendants' motions for decertification. See Memorandum of September 30, 1999, at 3-5, 1999 WL at *1-*2. We find it unnecessary to address further plaintiffs' misplaced arguments that the "separate accrual rule" applies.

In their brief, as in past briefs, plaintiffs recite conduct which is alleged in the complaint. We disregard allegations for purposes of summary judgment, the stage at which actual evidence must be produced.

The brief in opposition to plaintiffs' motion for reconsideration filed by First Eastern is a thorough and accurate refutation of plaintiffs' arguments. Since it would be a monumental task to address all of Plaintiffs' arguments, any issue not specifically addressed herein is resolved consistent with First Eastern's brief.

II. STANDARD

"The purpose of a motion for reconsideration is to correct

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[1] We note, without further comment, the likelihood the font was condensed for these purposes. See Brief of Arlene Conte and Ralph Conte at 6-7.

manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (citations omitted), cert. denied, 476 U.S. 1171, (1986). "Therefore, a court may properly grant a party's motion for reconsideration in any of the following circumstances: '(1) the development of an intervening change in the law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or prevent a manifest injustice.'" In re TMI Litigation Cases Consolidated II, 922 F. Supp. 997, 1008 (M.D. Pa. 1996)(Rambo, C.J.; quoting Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994); citations omitted in In re TMI). The granting of a motion to reconsider is an extraordinary remedy and a court should not do so when the motion is merely a re-styling or rehash of issues previously presented. McConccha v. Blue Cross and Blue Shield Mutual of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). A court should consider neither new evidence nor a new legal theory which could have been presented on the original motion, taking into account due diligence. Id. Mere disagreement with the court is a ground for an appeal, not a motion for reconsideration. Id.

III. PLAINTIFFS' MOTION FOR RECONSIDERATION

(A) Summary Judgment in Favor of First Eastern

The initial argument by plaintiffs is that the court erred in granting summary judgment in favor of the First Eastern defendants. The argument generally is a re-hash of the arguments presented in the original briefs of the parties, and we could deny the motion for reconsideration on that basis alone. We limit our analysis to those points raised for the first time.

Plaintiffs misconstrue our prior memorandum and order before arguing that there was error. They state that we held that Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998), controlled on the issue of whether First Eastern conducted the affairs of an enterprise. What we held was that First Eastern's role was analogous to that played by the

"secondary defendants" in Rolo. There was, and is, no evidence that First Eastern played a role in "conducting the affairs" of the alleged enterprise other than a contractual, arms-length relationship, the same as that played by the entities described in Rolo. Since First Eastern did not participate *directly* in the affairs of the enterprise, and cannot (under Rolo) be held civilly liable as an aider and abettor, it cannot be liable. Plaintiffs' argument amounts to nothing more than a contention that the role of an alleged aider and abettor should be viewed as the same as one who actually conducts the affairs of the enterprise, and is simply wrong.

(B) Denial of Leave to Amend & Supplement Complaint

Plaintiffs next complain that the court erred in denying their motion to amend and supplement the complaint with new alleged predicate acts based on the statute of limitations. They contend that the court cannot raise the defense of the statute of limitations *sua sponte*. The argument is actually rather silly, since the statute of limitations defense had been raised by defendants and was the subject of motions for summary judgment. It therefore was not raised *sua sponte*.

Plaintiffs again argue that the statute of limitation does not apply to acts occurring after the filing of the complaint. That principle can be said to be correct, but the same accrual date applies, based on the "injury plus pattern" rule.

(C) Summary Judgment on Common Law Fraud Claim

Plaintiffs argue that reconsideration is warranted on the grant of summary judgment in favor of First Eastern on their common law fraud claim. To do so, they re-characterize the claim as one of bankruptcy fraud and/or liability for the actions of MLA. The injuries allegedly suffered by plaintiffs from the purported fraud based on First Eastern's failure to disclose the precarious financial condition of CBG plainly are time-barred, as plaintiffs were put on notice of such a condition by the filing of CBG's bankruptcy. The alleged "massive fraud upon the bankruptcy court" did not alter the notice of financial troubles. Further,

plaintiffs' attempts to place liability for the actions of MLA on First Eastern based on agency simply are not supported by the record; "approval" of an action is not agency.

(D) Summary Judgment in Favor of Ralph Conte on RICO Claim

Of more merit is plaintiffs' motion as it relates to the grant of summary judgment in favor of Ralph Conte with respect to plaintiffs' RICO claim. In an early draft of our earlier memorandum, we reviewed First Eastern's arguments relating to the statute of limitations. Having determined that First Eastern's conduct was analogous to that of the secondary defendants in Rolo and therefore not actionable, we omitted the analysis from a later (and the final) draft as superfluous. However, in granting summary judgment in favor of Ralph Conte with respect to the RICO claim, we referred to the statute of limitations analysis.

We note initially that we reject plaintiffs' argument that he statute of limitations defense was not at issue, because the defense is plainly at issue at this point.

The question thus becomes whether any claim by a named plaintiff accrued within the limitations period. Plaintiffs point to the fact that Ralph Conte allowed CBG to use his broker's license in 1991 and 1992. What is absent from this recitation is an injury to a named plaintiff from any conduct constituting a predicate act within the limitations period. The statute of limitations *is* a valid defense to the RICO claim on the part of Ralph Conte, and so the omission of our analysis did not result in error.

(E) Summary Judgment in Favor of Arlene Conte

Plaintiffs argue that the court erred in granting summary judgment in favor of Arlene (Rainess) Conte with respect to the RICO claim. The motion is no more than a re-argument of our prior conclusion that there is insufficient evidence to support a finding that Arlene Conte was associated with an enterprise. There is no more evidence to support such a conclusion at this

time, either.

(F) Scheduling Motions as Moot

Plaintiffs argue that the court erred in failing to establish deadlines relating to expert witnesses. In an order issued January 7, 1999, we granted a motion by plaintiffs for an enlargement of time to file expert reports until disposition of the motions for summary judgment and class decertification. Due to the pending motions for reconsideration, those motions are not finally disposed-of, so that re-establishment of the deadlines prior to issuance of this memorandum and order would have been premature.

Finally, plaintiffs argue that it was error to conclude that their motion to compel discovery from MLA was moot. Because of the tortured history of this matter, it is not clear whether the motion is properly pending. However, we note that LR 26.3 of the Local Rules for the Middle District of Pennsylvania requires that a moving party certify that it has conferred with opposing counsel in a good faith effort to resolve discovery disputes without the intervention of the court. The certification appended to plaintiffs' motion indicates only that plaintiffs' counsel "notified the defendants and non-parties of plaintiffs' intention to file this motion for purposes of Local Rules 7.1 and 26.3, on May 21, 1998. I did not receive any concurrence."

Notification of the intention to file a motion to compel is not a conference with opposing counsel in a good faith effort to resolve discovery issues. The certification is nothing more than a certificate of non-concurrence in the motion. Any error in cur prior disposition was harmless, given the lack of a proper certification by counsel

IV. MLA'S MOTION FOR RECONSIDERATION

MLA seeks reconsideration of our earlier memorandum insofar as we denied its motion for summary judgment. We did so because the grounds for summary judgment simply were not set forth. MLA now recites, at greater length (although still lacking the separate statement of material facts required under

LR 56.1), its arguments in support of summary judgment. What is missing from the motion is any reason to excuse the failure to recite any of these arguments in the initial motion for summary judgment. Arguments which should have been presented initially but were not presented, are not a proper basis for reconsideration.

V. INTERLOCUTORY APPEAL

Plaintiffs seek leave to pursue an interlocutory appeal if their motion for reconsideration is denied. Since it will be denied, we consider the request for certification of an appeal. See generally 28 U.S.C. § 1292(b).

The appeal would entail review of both our decision to decertify the class and subclasses and the entry of summary judgment in favor of First Eastern (as well as any other decision adverse to plaintiffs). To merit interlocutory appeal, a movant must identify (1) a controlling question of law (2) about which there is substantial difference of opinion, the immediate resolution of which by the court of appeals will (3) materially advance the ultimate termination of the litigation. Cardona v. General Motors Corp., 939 F. Supp. 351, 353 (D.N.J. 1996).

The first question is whether the statute of limitations issue is sufficient to warrant decertification of the class and subclasses. There is substantial ground for difference of opinion, given the weight of plaintiffs' arguments contrary to our ruling.[2] Resolution of the question would materially advance the ultimate termination of the litigation by determining whether a trial involving only the 16 named plaintiffs is necessary, or ether a trial involving the entire class of plaintiffs is necessary.

The second question is whether the record supports plaintiffs' claims as to which summary judgment has been granted. Again, given the weight of plaintiffs' arguments contrary to our ruling, there is substantial ground for difference of opinion. As with the decertification question, resolution of the

---

[2] This court is firmly of one opinion. That does not mean that another court would not take a different view.

question would materially advance the ultimate termination of the litigation by determining whether a trial will proceed involving only the 16 named plaintiffs. Further, the identity of the defendants for trial purposes (just MLA or MLA with perhaps one or more co-defendants) would be established.

We recognize that interlocutory appeal of issues of class certification (and therefore, we presume, class decertification) must involve special circumstances before certification of the appeal is appropriate. Sullivan v. Pacific Indemnity Co., 566 F.2d 444, 445 (3d Cir. 1977); Link v. Mercedes-Benz of N.A., Inc., 550 F.2d 860, 862-863 (3d Cir.), cert. denied, 431 U.S. 933 (1977). We conclude that the entry of summary judgment against plaintiffs with respect to so many claims, and in favor of First Eastern generally, is sufficient "special circumstances" to warrant interlocutory appeal.

For purposes of Third Circuit Local Appellate Rule 5.1, we will certify the issues, in modified form, recited in plaintiffs' brief in support of their motion for reconsideration.

VI. CONCLUSION

The motions for reconsideration will be denied. Plaintiffs' request for leave to take an interlocutory appeal will be granted, and we will certify the appeal.

An order consistent with this memorandum will issue.

s/ James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEON R. DONGELEWICZ, et al., :
Plaintiffs, : No. 3:CV-95-0457
: (Judge McClure)
v. :
:
FIRST EASTERN BANK, et al., :
Defendants. :

FILED
WILLIAMSPORT, PA
FEB 8 2000
MARY E. D'ANDREA, CLERK
PER s/ bp
DEPUTY CLERK

ORDER

February 8, 2000

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT:**

1. Plaintiffs' motion (record document no. 401) for reconsideration, reargument, or alternative relief is denied.

2. The motion (record document no. 407) by defendant MLA Management Associates, Inc., for reconsideration is denied.

3. All documents prepared and filed by plaintiffs' counsel sha11 employ a courier font of at least 12 points, unmodified, so that the typeface shall be no smaller than ten characters per inch.

4. Plaintiffs' request for leave to pursue an interlocutory appeal is granted.

5. We certify that plaintiffs' appeal from our Memorandum and Order of Court dated September 30, 1999, and from this

Order Court and accompanying Memorandum involves controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from these orders may materially advance the ultimate termination of this litigation.

6. Proceedings in this court are stayed pending disposition of plaintiffs' interlocutory appeal.

7. We certify the following issues for interlocutory appeal:

(a) Whether the court erred in finding that Rolo was controlling on the issue of whether the First Eastern defendants "conducted the affairs of an enterprise";

(b) Whether the court erred by failing to apply the "operation or management test" with respect to whether the First Eastern defendants "conducted the affairs of an enterprise";

(c) Whether the court erred in not holding that the First Eastern defendants may be liable to RICO violations pursuant to the doctrine of *respondeat superior*;

(d) Whether the court erred by granting summary judgment in favor of the First Eastern defendants with respect to the RICO conspiracy claim when the record supports a finding of aiding and abetting a RICO violation;

(e) Whether aiding and abetting a RICO Predicate act itself constitutes a predicate act;

(f) Whether the court erred by drawing factual inferences favorable to the moving parties;

(g) Whether the court erred by denying leave to amend and supplement the complaint based on the applicability of the statute of limitations;

(h) Whether the court erred by finding, as a matter of law, that plaintiffs had notice of CBG's financial condition when it filed for bankruptcy;

(i) Whether the court erred in granting summary judgment in favor of Ralph Conte on the RICO claims based on the statute of limitations;

(j) Whether the court erred by finding that there was

insufficient evidence of record to support a finding that Arlene Conte was "associated with" a RICO enterprise;

(k) Whether the court erred in decertifying the class and subclasses based on the defense of statute of limitations, which would be unique to each plaintiff;

(l) Whether the court erred in denying plaintiffs' motion to compel discovery.

8. The court will schedule a case management conference after disposition of plaintiffs' appeal, and deadlines relating to expert reports will be established at that time.

s/ James F. McClure, Jr.
United States District Judge

Appendix D – Memorandum of the United States District Court for the Middle District of Pennsylvania Granting Petitioners' Motion for Class Certification, Dated June 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEON R. DONGELEWICZ, et al., : 3:CV-95-0457

Plaintiffs : Judge McClure

vs. :

FIRST EASTERN BANK, et al., :

Defendants :

FILED
WILLIAMSPORT, PA
JUN 19 1996
MARY E. D'ANDREA, CLERK
PER s/ bp
DEPUTY CLERK

MEMORANDUM

June 19, 1996

BACKGROUND:

Plaintiffs in this action are all lot owners in a 3856-acre recreational housing development called the Valley of Lakes (the development or the community) which is located in Schuykill and Luzerne Counties near Hazleton, Pennsylvania. Plaintiffs allege numerous improprieties on the part of

individuals and entities associated with or having an ownership interest in Valley of Lakes. Plaintiffs allege numerous acts of fraud and deception on the part of those allegedly responsible for marketing, developing and maintaining Valley of Lakes over the years.

The defendants named in this action are: 1) Frank M. Cedrone, a New Jersey resident; 2) C.B.G., Ltd., a New Jersey-based partnership (CBG); 3) Oneida Water Company (Oneida); 3) Valley Utilities Company, Inc. (Valley Utilities); 4) First Eastern Corporation (First Eastern Corp.), a Pennsylvania-based banking holding company; 5) First Eastern Bank, N.A. (First Eastern Bank); 6) MLA Management Associates, Inc. (MLA); Ralph Conte, a New Jersey resident; 8) Arlene Reiness, a New Jersey resident; 9) the Property Owners Association of the Valley of Lakes (POA), a Pennsylvania-based unincorporated association whose board members are: a) George Denke, Jr.; b) Dianne French; c) Ronald Kichline; and d) Thomas Pierson; and 10) PNC Bank Corp., a Pennsylvania-based bank holding company (Plaintiffs' complaint, ¶ 17-28)

Valley of Lakes has changed hands several times since the subdivision plan was first filed in 1971 by High Vista, Inc. (High Vista), a Pennsylvania corporation. (Plaintiffs' complaint, exhibits 1-1 to 1-4). Jack Halperin and Philip Cohen purchased High Vista in 1974 and marketed lots under the name "Valley of Lakes." (Plaintiffs' complaint, ¶ 41 and exhibit 2-1 to 2-29)

A property owner's association known as the Valley of Lakes Civic Association (VOLCA) was organized in December, 1976. (Plaintiffs' complaint, ¶ 45 and exhibits 4B-1 to 4b-24.)

On August 4, 1980, Halperin was indicted on federal charges of mail fraud, 18 U.S.C. § 1341, and of violating the Interstate Land Sales Full Disclosure Act, (federal Land Sales Act) 15 U.S.C. §§ 1701-1720. The charges arose out of Halperin's activities in connection with Valley of Lakes. He was charged with, inter alia, charging maintenance fees for services not rendered and with failing to follow through on representations that a lake, roads, a sewer system and other amenities would be

built at Valley of Lakes. (Plaintiffs' complaint, ¶¶ 42, 43, 68 and exhibits 3-1 to 3-24).

Following Halperin's indictment, the mortgage on the property was foreclosed. Meridian Bank (Meridian) purchased the land at a Sheriff's Sale.

In September, 1986, CBG, a New Jersey-based partnership, purchased land in the development. The original general partners of CBG were defendant Cedrone and a Sicilian construction company, SILEC SPA of Torino, Italy. (Plaintiffs' complaint, ¶ 46). Plaintiffs allege that although CBG subsequently held itself out as the successor to High Vista, it was not High Vista's successor, and that it was in fact only another purchaser of land in the development, no more entitled to assume a position of management or control over the subdivision than any other property owner. (Plaintiffs' complaint, ¶ 47)

CBG filed a Chapter 11 petition in bankruptcy in March, 1992, but continues to maintain control over the Valley of Lakes as debtor-in-possession through its association with First Eastern and through the affiliated companies of Oneida and Valley Utilities. (Plaintiffs' complaint, ¶ 49)

Plaintiffs allege a long history of mismanagement, broken promises and outright fraud on the part of those in management and ownership positions at Valley of Lakes over the years.

Plaintiffs allege, inter alia, that: 1) representations that an 80-acre lake, "Lake Algonquin", and an Arnold-Palmer designed and managed golf course, and other business amenities including restaurants and shops, would be built on the premises were never fulfilled; 2) representations that road systems, and water and sewer systems would be built and adequately maintained for lot owners were never carried out; 3) defendants incurred substantial advertising and promotional costs in their efforts to promote the sale of lots to other purchasers, which they then passed on to pre-existing property owners, citing as proof of the same filings with the Department of Housing and Urban Development (HUD) which state that "approximately 35%" of closing costs represented promotional costs; and 4) defendants,

acting illegally and without proper authority, imposed covenants and restrictions on Valley of Lakes property owners which unduly, illegally, and unconstitutionally interfere with their right of ownership.

Based on the foregoing allegations, plaintiffs assert: 1) a RICO claim under 18 U. S. C. § 1962 against all defendants (Count I);[1] 2) a claim under the federal Land Sales Act, 15 U.S.C. § 1701, against CBG, Cedrone, First Eastern Bank, and MLA (Count II); 3) a section 1983 claim, 42 U.S.C. § 1983 (Count III) against CBG, Cedrone, First Eastern Bank and MLA;[2] 4) a claim under the New Jersey Real Estate Sales Full Disclosure Act, (New Jersey Land Sales Act) N.J.S.A. § 45:15-16.47, against First Eastern, CBG, Cedrone and Conte (Count IV); and 5) supplemental state law claims of fraud and deceit asserted against First Eastern, MLA, CBG, Cedrone, Valley Utilities and Oneida under New Jersey law. (Count V).

This court denied a motion by defendant POA to dismiss plaintiffs' RICO and section 1983 claims (Counts I and III) on the grounds that no cause of action has been alleged against it.

Presently before the court are: 1) plaintiffs' motion for class certification (record document no. 31); 2) a motion by defendants First Eastern Bank and First Eastern Corp. to compel the depositions of the named plaintiffs and to stay the disposition of plaintiffs' motion for class certification (record document no. 37); and 3) a motion by defendant MLA to stay the disposition of plaintiff's motion for class certification (record document no. 41).

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[1] Plaintiffs allege that defendants committed predicate acts of mail and wire fraud under 18 U.S.C. § 1341 and 1343 and violated federal securities laws.

[2] Although paragraph 29 of plaintiffs' complaint states that Count III is alleged only as against defendants CBG, Cedrone, First Eastern Bank and MLA, it appears that plaintiffs are pursing a section 1983 claim against defendant POA as well. See: plaintiff's brief filed in opposition to defendant's Rule 12(b) motion, record document no. 5 at pp. 25-34.

For the reasons which follow, we will enter an order: 1) granting the motion for class certification; and 2) denying defendants' motions to stay disposition of the motion for class certification.

DISCUSSION

MOTION FOR CLASS CERTIFICATION

Primary and subclasses proposed by plaintiffs

The first step in ruling on certification is defining the class. Miller, An Overview of Federal Class Actions: Past, Present, and Future, 15-16 (Fed. Jud. Center 1977). Plaintiffs propose certification of a "primary class" consisting of:

> All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in the "Valley of Lakes" subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania.
>
> and
>
> who are asserting a cause of action under RICO, 18 U.S.C. § 1962,against all of the defendants (Count I).

Plaintiffs further propose the division of the primary class into four subclasses, consisting of:

Subclass A, which would include:

> All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased unimproved lots in the "Valley of Lakes" subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania
>
> and
>
> who are asserting a cause of action under the Interstate

Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq., against defendants C.B.G. Ltd., Frank Cedrone and Ralph Conte (Count II);

Subclass B, which would include:

All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have owned lots, whether improved or unimproved, in the "Valley of Lakes" subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania

and

who are asserting a cause of action under 42 U.S.C. § 1983 against defendants C.B.G., Frank Cedrone, Property Owners Association and MLA Management Associates (Count III);[3]

Subclass C, which would include:

All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in the "Valley of Lakes" subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania, based on

a) any offer or disposition made in or from the State of New Jersey; or

b) any offer directed by the developer or its agent originating from outside the State of New Jersey to the persons or entities within the State of New Jersey

and

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[3] Plaintiffs seek certification of subclass "B" under Rule 23(b)(2). Certification of the primary class and all other proposed subclasses is sought under Rule 23(b)(3).

who are asserting a cause of action under the New Jersey Real Estate Sales Full Disclosure Act, N.J.S.A. 45:15-16.47, against defendants C.B.G., Ltd., Frank Cedrone and\or Ralph Conte (Count IV);

and

Subclass D, which would include:

All persons and entities throughout the United States and its territories (other than the defendants named in the complaint) that, since September 30, 1986, have purchased or owned lots, whether improved or unimproved, in the "Valley of Lakes" subdivision located in Schuylkill and Luzerne Counties near Hazleton, Pennsylvania,

and

who are asserting a cause of action for common law fraud and deceit under New Jersey law against defendants First Eastern Corp., First Eastern Bank, MLA Management Associates, Inc., C.B.G., Ltd., Frank Cedrone, Valley Utilities Co., Inc. and\or Oneida Water Co. Company relating to the Valley of Lakes subdivision.

(Record document no. 31, pp. 1-3)

Prerequisites to a class certification

Under Rule 23 of the Federal Rules of Civil Procedure, obtaining class certification is a two-step process. The moving party must first persuade the court that the putative class meets the four preliminary requirements of Rule 23(a), which are:

1) the class is so numerous that joinder of all members is impracticable;

2) there are questions of law or fact common to the class;

3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

The class proponent bears the burden of proving that the class should be certified by establishing each of these elements. Freedman v. Arista Records, Inc., 137 F.R.D. 225, 227 (E.D. Pa. 1991). Any doubts about certification should be resolved in favor of class treatment. Skeet v. Sears, Roebuck & Co., 137 F.R.D. 347, 350 (D.Kan. 1991). If subsequent developments warrant, the class can always be decertified at a later date. Bonilla v. Trebol Motors Corporation, 1993 WL 138297 at * 3 (D.P.R. March 30, 1993).

In deciding whether to certify the class, the court need not and should not reach the merits of the case. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). As in ruling on a Rule 12(b) motion, the court can consider all properly pleaded substantive allegations as true. Bonilla 1993 WL 138297 at * 2.

If the Rule 23(a) requirements are satisfied, the moving party must then establish that certification is appropriate under at least one subsection of Rule 23 (b). Baby Neal v. Casey, 43 F.3d 48, 55-56 (3d Cir. 1994). Here, the plaintiffs seek certification under two subsections of Rule 23(b). Certification of subclass "B" is sought under Rule 23(b)(2). Certification of the primary class and all other proposed subclasses is sought under Rule 23(b)(3).

To certify a class under Rule 23(b)(2), the court must find that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Although a proposed class that seeks damages may be certified under Rule 23(b)(2), see, e.g., Bishop v. New York City Dep't of Housing Preservation and Development, 141 F.R.D. 229, 240 (S.D.N.Y. 1992), certification should be withheld if claims for damages predominate. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968).

To certify a class under Rule 23(b)(3), the court must determine that "questions of law or fact common to the members

of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768, 796 (3d Cir. 1995), cert. denied, 133 L.Ed.2d 45 (1995).

Numerosity

To warrant certification, the class must be so numerous that joinder of all class members would be impracticable. Freedman, 137 F.R.D. at 228. No specific number of class members is required. However, case law in general suggests that if the proposed class contains less than twenty five members, numerosity is lacking. If, on the other hand, the proposed class includes forty or more members, numerosity probably exists. Other factors, such as the geographic dispersion of the class also weigh in the equation. Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 406 (D.N.J. 1991), citing 3 B.J. Moore, Moore's Federal Practice, ¶ 23.05[1] (2d Ed. 1982).

The numerosity requirement is plainly satisfied here. Plaintiffs submit in support of their motion documents indicating that the primary class and the four proposed subclasses each number in the hundreds.[4] Plaintiffs submit a database report compiled in 1993[5] listing the names and addresses of lot owners. The list includes over 800 names, not including spouses and co-owners who reside throughout Pennsylvania, in a number of other states, and in a few cases, in other countries. Any attempt to join successfully all of these individuals in a single action would plainly be doomed from the start as hopelessly impracticable and fraught with administrative and practical problems. The numerosity requirement plainly has been met.

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[4] The same individuals may, of course, be and most likely are, members of more than one subclass.

[5] Record document no. 33, exhibit "E."

Commonality

Certification is appropriate only if there are common questions of law and fact. Class relief "is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'" In re American Medical Systems, Inc., 75 F.3d 1069, 1080 (6th Cir. 1996), quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979).

Rule 23(b)(3), under which plaintiffs seek certification, includes a commonality requirement more stringent than its Rule 23(a) counterpart. When the two are considered together, the Rule 23(a) commonality requirement is subsumed by its Rule 23(b) counterpart. Harding v. Tambrands, Inc., 165 F.R.D. 623, 627 (1996). For that reason, we see no reason to address the Rule 23 (a) commonality issue separately, and will consider only whether the more stringent Rule 23(b)(3) commonality requirement has been satisfied for the primary class and three of the four subclasses. Rule 23(b)(2), under which plaintiffs seek certification of subclass "B," does not contain the same predominance requirement, so we consider separately the question of whether it has satisfied the Rule 23(a) commonality requirement.

Proposed subclass B consists of property owners who assert a section 1983 claim against defendants C.B.G., Frank Cedrone, Property Owners Association and MLA Management Associates. Plaintiffs allege that defendants have no authority to impose land use restrictions, security measures or exercise other quasi-governmental powers over them or their use of their properties and that their imposition of such measures is a violation of plaintiffs' constitutional rights. (See: Plaintiffs' complaint, ¶ 387 and complaint exhibits 10-10 to 10-12 and 11-2)

Whether section 1983 liability attaches will turn on issues of whether defendants 1) had lawful authority to impose zoning restrictions, hire a security force to patrol and control access to Valley of Lakes and carry out other governmental and quasi-

governmental functions; and 2) carried out such functions without lawful authority and in violation of plaintiffs' constitutional rights. See generally: Evans v. Newton, 382 U.S. 296 (1966) and Pitt v. Pine Valley Golf Club, 695 F.Supp. 778, 783 (D.N..J. 1988). These issues are common to the class as a whole and plainly justify a finding that the Rule 23(a) commonality requirement has been satisfied.

Typicality and adequacy of representation

The typicality requirement imposed by Rule 23(a)(3) is intertwined with the Rule 23(a)(4) requirement that the named representative adequately represent the entire class. If the class representatives' claims are not typical of the class, they cannot adequately protect the interests of the class. Harding, 165 F.R.D. at 628. "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." In re American Medical Systems, Inc., 75 F.3d at 1082 (quoting 1 Herbert B. Newberg & Alba Conti, Newberg on Class Actions, § 3-13, at 3-76 (3d ed. 1992)). However, certification should not be denied solely on the basis of a theoretical conflict which could arise at a later stage of the case. In re Intelligent Electronics, Inc., Securities Litigation, 1996 WL 67622 at * 4 (E.D.Pa. Feb. 13, 1996.)

Here, each of the named plaintiffs owns a lot or a home in Valley of Lakes. The group is a representative cross-section of owners in terms of their length of ownership and their means of acquisition. Some named plaintiffs purchased their lots as early as 1976. Others purchased their properties as recently as 1991. All remain owners in the development, giving them a strong interest in pursuing the claims asserted to a successful conclusion.

Further, the group of named representatives includes owners whose claims are typical of those asserted by the primary class and each of the four subclasses. The class representatives plainly share common objectives, legal and factual positions with the primary class and subclasses they seek to represent.

The other component of the typicality requirement is a determination of adequacy of the counsel chosen to represent the class. In re American Medical Systems, 75 F.3d at 1083. Plaintiffs propose to retain Roger S. Antao, Esq. and Enna Chuang, Esq., named plaintiffs' current counsel, as class counsel. An affidavit filed by Antao in support of plaintiffs' motion supplies the following information: 1) Antao and Chuang are partners in the law firm of Antao & Chuang; 2) their practice focuses on litigation and international business; 3) they have served as lead counsel in other actions filed in the federal and state courts; 4) counsel are well-acquainted with the facts and the law applicable to this action, having performed all of the legal work completed up to this point, including the pre-filing investigation, drafting the complaint, opposing the motion to dismiss filed by POA, representing plaintiffs at court conferences, and in preparing the motion for class certification.

Counsels' experience and qualifications and the work they have performed on this case thus far persuade the court that they will ably and skillfully represent the interests of the class.

The plaintiffs have established all four requirements for certification imposed by Rule 23(a). It remains for us to determine whether the Rule 23(b) requirements have likewise been satisfied.

REQUIREMENTS OF RULE 23(B)(2)

Plaintiffs seek certification of subclass "B" under Rule 23(b)(2) and of the primary class and all other subclasses under Rule 23(b)(3). We consider first the Rule 23(b)(2) request for certification of the subclass asserting section 1983 claims.

Rule 23(b)(2) is intended for classes who seek primarily injunctive relief as redress for the defendants' conduct. If monetary claims predominate, Rule 23(b)(2) certification is not appropriate. Fed.R.Civ.P. 23, advisory committee's notes.

The relief sought by subclass "B" is primarily injunctive. Plaintiffs seek an order declaring that defendants have no authority to exercise quasi-government powers over the residents, property owners, and guests of the community and

directing them to cease purporting to exercise such authority by imposing zoning restrictions, building codes, and other land-use restrictions, limiting access to the community, and other activities. As we discussed above, the claims asserted under section 1983 share common issues of law and fact and are otherwise suitable for litigation as class action claims. We will, on that basis, certify subclass "B" under Rule 23(b)(2).

REQUIREMENTS OF RULE 23(B)(3)

Two requirements must be satisfied for Rule 23(b)(3) certification. Plaintiffs must show that: 1) questions of law or fact common to the class members predominate over questions affecting individual members, and 2) the class action is superior to other available methods of adjudication. In re Northern District of California, Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 855 (9th Cir. 1982) and Freedman v. Louisiana-Pacific Corporation, 922 F. Supp. 377, 399 (1996).

Predominance

The question of whether common issues predominate is committed to the trial court's discretion. Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995). The predominance requirement focuses primarily on whether the claims arise out of a common nucleus of operative fact and on whether there are any material variations among the claims of the potential class members. Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 190-91 (D. Kan. 1991).

RICO claims

The primary class is defined to include all property owners who assert a RICO claim against the defendants. Plaintiffs assert claims under several provisions of RICO. RICO makes it unlawful for any person to: 1) use or invest income obtained from a pattern of racketeering activity in an enterprise engaged in interstate commerce, 18 U.S.C.A. § 1962(a); 2) control any enterprise engaged in interstate commerce through a pattern of racketeering, 18 U.S.C.A. § 1962(b); 3) any person associated

with any enterprise engaged in interstate commerce to conduct the affairs of the enterprise through a pattern of racketeering activity, 18 U.S.C.A.§ 1962(c); or 4) to conspire to violate sections 1962(a), (b), or (c), 18 U.S.C.A. § 1962(d).

Section 1962(c) provides, in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Racketeering activity" is defined to include any act which is indictable under any of the enumerated provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(l).

To recover under Section 1962(c), plaintiffs must establish: 1) the existence of an enterprise affecting interstate commerce; 2) that the defendant was employed by or associated with the enterprise; 3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise and 4) that defendant participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts. Greenberg v. Tomlin, 816 F. Supp. 1039 (E.D. Pa. 1993) citing Sedima, S.P.R.L. v. Imrex Co., 473 U. S. 479, 496 (1985).

To establish their claims of a RICO conspiracy under section 1962(d), the plaintiffs must prove: 1) the period of the conspiracy; 2) the object of the conspiracy; 3) the actions of the alleged conspirators taken to achieve that purpose; and 4) that the defendants agreed to commit the predicate acts and that they knew the acts were part of a pattern of racketeering activity. Greenberg, 816 F. Supp. at 1048, citing Glessner v. Kenny, 952 F.2d 702, 714 (3rd Cir. 1991), rev'd in part on other grounds, Jaguar Cars, Inc. v. Royal Oaks Motor Car Company, Inc., 46 F.3d 258 (3d Cir. 1995).

Plaintiffs' right to assert a private cause of action for alleged

section 1962 violations is premised on section 1964 (c), which provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). The requirement that a plaintiff demonstrate an injury to his business or property "by reason of" the alleged RICO violation incorporates into his cause of action a proximate cause requirement. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L.Ed.2d 532, 542 (1992).

Certification of similar consumer fraud claims was granted by the United States District Court for the District of Puerto Rico in Bonilla, 1993 WL 138297 at * 4. Plaintiffs alleged that they had been defrauded by Volvo Car Corporation, its subsidiaries and local Volvo dealers. Plaintiffs allege that over a ten-year period, defendants had routinely defrauded Volvo buyers by selling Volvo model 24ODL, as the more expensive Volvo model 240 GLE.

Asserting claims under RICO, plaintiffs moved for class certification under Rule 23(b)(3). In granting certification, the court held that common issues predominated, rejecting defendants' concerns that individual questions of reliance would dominate the case. The district court stated:

> The Court is satisfied that common questions to the members of the proposed class in this case predominate over any questions affecting only individual members. The type of economic injury suffered by plaintiffs and members of the class, as well as the recoverability of those damages are questions of law and fact common to the class. Defendants' alleged fraudulent representations, schemes and actions, as well as their alleged utilization of the mail, wires and financial

> institutions in furtherance of those schemes, constitute an essential common factual link between all class members and the defendants for which RICO provides a remedy. Simply put, the purchase of the proposed class members of their Volvo vehicles from the defendants is the essential link between all class members and the defendants. **The primary questions to be resolved in this case--whether a scheme to defraud existed and whether defendants engaged in any actions, made any representations,, or pursued a common course of material nondisclosure and omissions to bring their schemes to fruition--apply to all the proposed class members equally.**

Id. at 4-5 (Emphasis supplied).

Plaintiffs allege that the defendants "engaged in standardized conduct toward all members of the proposed class." Such allegations strongly suggest that the required common nucleus of operative fact exists. Benion v. Bank One, Dayton, N.A., 1996 WL 242994 at * 4 (N.D. Ill. May 7, 1996), citing Villareal v. Snow, 1996 WL 28254 at * 3 (N.D. Ill. Jan. 19, 1996) and Chandler v. Southwest Jeep-Eagle, Inc., 162 F.R.D. 302, 308 (N.D. Ill. 1995).

Plaintiffs allege that defendants CBG, Cedrone, First Eastern, MLA and others:

> through a pattern of racketeering activity acquired control of the enterprise of illegally operating and managing High Vista's subdivision...Valley of Lakes... in violation of 18 U.S.C. [sic] (b), (c) and (d). The defendants knowingly and willfully devised a scheme and artifice to defraud lot owners and prospective lot owners in the defunct subdivision through numerous false and fraudulent pretenses, representations and promises...

(Plaintiffs' complaint, ¶ 50)

Plaintiffs allege that Cedrone, CBG and POA wilfully

devised a scheme to use "the fraudulent covenants and restrictions recorded by CBG" to continue a pattern of racketeering which included the use of mass mailings announcing the formation of a "property owners association" in which would vest authority to control the community until Cedrone was in a position to resume control. (Plaintiffs' complaint, ¶¶ 248-49) The mailings are, plaintiffs' assert, part of a continuing scheme on the part of defendants Cedrone, CBG and POA to exercise unauthorized control over the community and to extract money from property owners under false pretenses by, among other things, imposing dues and fees. (Plaintiffs' complaint, exhibits 211 and 212)

The issues involved in establishing the alleged RICO violations are the same for each plaintiff. At issue will be, inter alia: 1) whether defendants engaged in any racketeering activity; 2) whether defendants' mass mailings violated the federal statute against mail fraud; 3) whether such mailings were used on more than one occasion to disseminate fraudulent information.

Liability or non-liability under RICO plainly depends on evidence of defendants' conduct, not upon acts of the plaintiffs. Liability issues under RICO are, therefore, plainly common to all class members.

The same may not be true as to questions of damages. Under RICO, a plaintiff has standing to recover monetary damages if and only to the extent that he or she has been injured in his business or property by the conduct constituting the violation. Thus, if a violation of RICO is shown, each plaintiff will have to show that the violation caused injury to his or her property. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985). Although this may require individual proofs, that alone is not a sufficient basis for denying certification when common issues of liability predominate. If necessary, individual hearings on the issue of damages can be held if the primary class prevails on RICO liability issues.

Land Sales Act and Common Law Fraud Claims

Plaintiffs allege that defendants violated section

1703(a)(2)of the federal Land Sales Act. Section 1703(a)(2) makes it unlawful for:

> ... any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails--
>
> * * *
>
> (2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title--
>
> (A) to employ any device, scheme, or artifice to defraud;
>
> (B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or
>
> (D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

15 U.S.C. § 1703(a)(2) .

Whether common questions predominate in the fraud-based claims, i,e. the claims plaintiffs asserted under the federal and state land Sales Acts and under New Jersey common law remains for our consideration. Defendants argue that common questions do not predominate in any of the fraud-based claims, because all such claims require proof of reliance by the plaintiff and the likelihood that individuals may have relied on alleged

misrepresentations to varying degrees or not at all will require individualized proof to sustain a recovery by each member of the class. Defendants' argument is not without support. See, e.g., Freedman, 13 7 F.R.D. at 229 (refusing to certify proposed class of album purchasers who claimed they were defrauded: "What causes a person to respond positively to a performance is a complex matter ... not susceptible to a class based determination of inducement").

Although reliance can under some circumstances, be presumed, that is not universally the case. Reliance may be presumed only "where it is logical to do so." Sharp v. Coopers & Lybrand, 649 F.2d 175, 188 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982). It is equally true that reliance is an essential element of a plaintiff's claim of fraud. Reliance supplies proof of causation. Absent evidence of it, the requisite causal connection between the defendant's conduct and harm sustained by the plaintiff is lacking.

Fraud-based claims have been certified in other contexts not dissimilar to this action. The same issues arise in cases in which plaintiffs seek class certification to pursue claims of securities fraud or consumer fraud. In many such cases, the courts have granted certification finding that the existence of reliance issues, does not preclude a finding that common issues predominate.

In securities fraud actions, the courts have held that plaintiffs relying on a fraud on the market theory to establish their case can prove the reliance element of their cause of action by proving that defendants' alleged misrepresentations affected the market price and in that way impacted class members who purchased or held the stock during the relevant period. See, e.g. In re Reqal Communications Corp. Securities Litigation, 1995 WL 550454 at *8 (E.D. Pa. 1995); Mellon Bank Shareholder Litigation, 120 F.R.D. 35 (W.D. Pa. 1988) (the fact that some plaintiffs may have relied on oral representations of brokers while others relied on the annual report and prospectus not a barrier to certification); and Weinberger v. Thorton, 114 F.R.D.

599 (S.D. Cal. 1986) (Commonality exists if the same scheme is used on a class of purchasers for an extended period of time).

Although we concede that the application of a fraud on the market theory in a non-securities case may be a novel concept, we see no compelling reason why the same justifications would not apply here. Defendants' much touted and well-publicized plans to construct a man-made lake, a golf course, restaurants, shops, roads and other amenities likely affected the market price of lots and houses in the community. To the extent that that is proven to be the case, plaintiffs will be able to establish on a class-wide basis, harm caused by representations established to be false or fraudulent.

Even if without resort to a fraud on the market theory, there is sufficient support in the record to justify a finding that reliance may be presumed if an adequate foundation is laid at trial.

Many of the representations plaintiffs assert are false were universally made. Defendants' purported plans to construct a golf course, a man-made lake and other amenities were well-publicized and comprised an integral part of their marketing campaign. Undoubtedly brochures, pamphlets and other written materials were widely disseminated to potential purchasers to persuade them to buy a home or a lot in the community. Although some owners may have purchased their lots privately and not from the marketers, that distinction is not sufficiently divisive to justify denying certification.

The class-wide interests in establishing the falsity and impact on market prices have the potential to diverge substantially only when the issue of damages is reached. As we held with respect to the RICO claims asserted by the primary class, that alone is not a basis for denying certification. If necessary, individualized proofs of damages can be admitted at the conclusion of the liability phase of the trial. In re American Medical Systems, Inc., 75 F. 3d at 1084 and Sterling v. Velsicol Chem. Corp., 855 F. 2d 1188, 1196-97 (6th Cir. 1988).

Superiority

Plaintiffs' final hurdle is the required showing under Rule

23(b)(3) that a class action is superior to other means of fairly and efficiently resolving the dispute. Matters pertinent to the latter finding include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

These factors should be considered from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. Katz v. Carte Blanche Corporation, 496 F.2d 747, 760 (3d Cir.), cert. denied, 419 U.S. 885 (1974).

This action is well-suited for class adjudication. The extent of the conduct which gives rise to the claims asserted would make it extremely costly and inefficient for individual plaintiffs to litigate all of the claims asserted here. The events which give rise to the claims asserted span more than ten years and involve hundreds of separate acts, incidents, decisions, etc.

This is particularly true of plaintiffs' RICO and section 1983 claims--claims which are based on a multitude of individual acts spanning nearly a decade. Leaving plaintiffs to the onerous burden of litigating such claims on an individual basis would be tantamount to nullifying the claims. While nothing would prevent them from doing so, as a practical matter, few would willingly undertake the enormous task of amassing the mountain of evidence required to prove such claims. See: Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 189 (N.D. Ill. 1992). From the court's perspective, conducting individual trials on claims sharing so many central common issues would by an extremely wasteful use of the court's time and judicial resources.

MOTIONS TO STAY AND COMPEL PLAINTIFFS' DEPOSITIONS

Certification requirements met

Consideration of the elements necessary for certification convinces this court that certification is appropriate at this stage and deferral of consideration of the motion to allow defendants to conduct discovery is not appropriate.

Defendants' only substantive objection to the suitability of this action for certification is the inclusion of fraud-based claims. Defendants argue that other courts have been reluctant to certify as class actions lawsuits involving fraud-based claims arising out of oral or written representations made to individual plaintiffs. Those considerations are not dispositive, in this instance, because of the nature of the claims asserted and the events which gave rise to those claims.

Discovery and scheduling issues

Plaintiffs have taken the position that under the court's order of July 1, 1995, discovery is not appropriate or permissible pending disposition of the motion for class certification. That was never the court's intent, and there would appear to be no language in the order from which such intent could be reasonably inferred. It was not this court's intention to stay discovery pending the grant or denial of class certification. Plaintiffs are obliged, therefore, to respond to appropriate discovery demands of the defendants.

SUMMARY

In summary, the motion for class certification has merit and will be granted. See Fed. R. Civ. P. 23(c)(1). Nothing would be gained by delaying disposition of the motion.

s/ James F. McClure, Jr.
United States District Judge

Appendix E – Order of the United States Court of Appeals for the Third Circuit, Dated August 19, 2004, Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.03-1045

LEON R. DONGELEWICZ, *et al.*,

Appellants

v.

PNC BANK, N.A. et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

District Court Judge: The Honorable James F. McClure
(D.C. Civil No. 95-cv-00457)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge. SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, CHERTOFF, FISHER, VAN ANTWERPEN and

STAPLETON*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: August 19, 2004
RLS/cc: Antao, Roger S.
Chuang, Enna
Arbittier, Steven A.
May, Darryl J.
Roberts, Thomas B.

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* Judge Stapleton's vote is limited to panel rehearing only.

Appendix F –Judgment of the United States Court of Appeals for the Third Circuit Dated July 23, 2004

UNITED STATES OURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1045

LEON R. DONGELEWICZ; MARGARET J. DONGELEWICZ, Husband and Wife; FRANCIS X. BURNS; LAURA BURNS; LOIS A. BURNS; GEORGE M. DE PERSIA; SHARON M. DE PERSIA, Husband and Wife; JOHN B. KNOX; BETSY C. KNOX, Husband and Wife; *ESTATE OF JOHN T. MIELE; FRANK J. RACHUBINSKI; HELEN A. RACHUBINSKI, Husband and Wife; SENTA M. SHERIDAN; GER D.J. SMIT; WACLAW SZCZESNIAK; DANUTA SZCZESNIAK, Husband and Wife, For Themselves and on Behalf of all Others Similarly Situated,

Appellants

v.

*PNC BANK NATIONAL ASSOCIATION, Successor by Merger to First Eastern Bank,** BANKSHARES REALTY COMPANY, Successor to First Eastern Corp.; FRANK M. CEDRONE; C.B.G. LIMITED, A Pennsylvania Limited Partnership; ONEIDA WATER COMPANY, A Company Organized Under the Laws of Pennsylvania; VALLEY UTILITIES COMPANY, INC., A Pennsylvania Corporation; MLA MANAGEMENT ASSOC, A Pennsylvania

Corporation; RALPH CONTE; ARLENE REINESS; THE PROPERTY OWNERS ASSOCIATION OF THE VALLEY OF LAKES, An Unincorporated Association

*(Amended Per Clerk's Order dated Janaury 17, 2003)

**(Amended Per Court Order dated April 23, 2003)

On Appeal from the United States District Court
for the Middle District of Pennsylvania

District Court Judge: The Honorable James F. McClure
(D.C. Civil No. 95-cv-00457)

Argued on January 26, 2004

Before: NYGAARD, FUENTES, and STAPLETON, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania argued on January 26, 2004. On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered December 12, 2002, be, and the same is hereby AFFIRMED. Each party to bear its

own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Kathleen Brouwer
Chief Deputy Clerk

Dated: July 23, 2004

Appendix G – Statutory Provisions Involved

- **15 U.S.C. § 15b. Limitation of actions;**
- **18 U.S.C. § 1964. Civil remedies;**
- **Fed. R. Civ. P. 23. Class Actions.**

15 U.S.C. § 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the

essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Fed. R. Civ. P. 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning

the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the

class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.
(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.
(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a

certified class.
(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.
(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.
(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).
(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

g) Class Counsel.

(1) Appointing Class Counsel.
(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.
(B) An attorney appointed to serve as class counsel must fairly

and adequately represent the interests of the class.
(C) In appointing class counsel, the court
(i) must consider:
• the work counsel has done in identifying or investigating potential claims in the action,
• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
• counsel's knowledge of the applicable law, and
• the resources counsel will commit to representing the class;
(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
(iv) may make further orders in connection with the appointment.
(2) Appointment Procedure.
(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.
(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.
(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:
(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served

on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Appendix H – Petitioners' Proposed Supplement to the Complaint (without exhibits)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In re:	)	
	)	
VALLEY OF LAKES	)	
RICO CLASS ACTION LITIGATION	)	
LEON R. DONGELEWICZ, et al.,	)	CASE NO.
	)	3:CV-95-0457
Plaintiffs,	)	
	)	
vs.	)	(JUDGE: James F.
	)	McClure, Jr.)
FIRST EASTERN BANK, et al.,	)	
	)	
Defendants.)		

FILED
WILLIAMSPORT, PA
MAY 27 1998

PER s/ lg
DEPUTY CLERK

SUPPLEMENTAL PLEADING[1]

404. Plaintiffs repeat and re-allege all of the allegations contained in the complaint as fully as if set forth here.

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[1] This pleading both amends the complaint pursuant to Federal Rule
(Cont'd)

405. This pleading does not add any new causes of actions or parties. It only supplements Count I of the complaint against PNC Bank, N.A.[2] (by merger with First Eastern Bank, N.A.), with (a) transactions, events and occurrences which took place after the original complaint was filed, and which were revealed by plaintiffs' discovery, primarily upon third parties; and (b) certain additional transactions, events and occurrences which took place prior to the filing of the original complaint but which were concealed from the plaintiffs, and were discovered primarily by plaintiffs' discovery upon third parties.

406. All of the events and occurrences alleged herein are part of the "Scheme to Continue Racketeering Using Chapter 11 Bankruptcy Protection", the "Scheme of First Eastern Bank ... to continue pattern of racketeering indefinitely", and the "Land Development Scheme" alleged in the complaint.

407. After C.B.G. Ltd. ("CBG") filed its bankruptcy petition, on or about March 30, 1992, until CBG's assets were transferred to Double Diamond Inc. ("DDI") in 1996, PNC knowingly and fraudulently continued to receive payments from CBG, approximately two times a month, on CBG's "receivable line

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(Cont'd)
of Civil Procedure 15(a), and supplements the complaint pursuant to Federal Rule of Civil Procedure 15(d). However, because of the enormous size of the original complaint and exhibits, and the fact that the amendment of the original complaint herein only adds additional transactions, events and occurrences: Plaintiffs are submitting this pleading in the form of a supplement to the original complaint with paragraphs that continue the numbering of the original complaint and exhibits, without physically duplicating the entire original complaint and exhibits, which are incorporated herein by reference, for the convenience of the Court and all parties.

2 All references to PNC refer to (a) First Eastern Bank, N.A. prior to its merger with PNC Bank, N.A., and (b) PNC Bank, N.A. after its merger with First Eastern Bank, N.A.

of credit" with PNC, by collecting mortgage payments which were remitted by certain class members as payment on the notes to CBG's purchase money mortgages. Under the terms of the $10,000,000 receivable line of credit from PNC to CBG, PNC would advance 90% of the amount financed by CBG on its purchase money mortgages to lot purchasers. CBG would then collaterally assign the notes to PNC, i.e., the notes continued to be the property of CBG. PNC's agent, C&E Credit of Emerson, N.J., collected the payments from the mortgagors, and remitted the funds to PNC as payments on CBG's receivable line of credit. In addition, PNC sold participating interests in CBG's receivable line of credit to two other banks: BSB Bank and Trust Co., successor to Binghamton Savings Bank ("BSB"), and CoreStates/First Union, previously Hamilton Bank/CoreStates.

408. PNC maintained a bank account for C.B.G. Ltd. at the Dime Savings Bank of New York, FSB (successor to Anchor Savings Bank) in Emerson, New Jersey (Account #020302070713280), ("DIME account"), where C&E Credit would deposit payments that it collected from mortgagors on CBG's purchase money mortgages. C&E would then forward the funds to PNC as payment on CBG's receivable line of credit.

409. Copies of the bank records for the "DIME account", monthly statements from November 8, 1988 to May 26, 1989, June 26, 1989 to December 31, 1995, January 27, 1996 to October 26, 1997, are annexed hereto as Exhibit "303."

410. On or about May 20, 1992, First Eastern's President filed a Corporate Certification with DIME representing that the Federal Identification Number for the bank account title "First Eastern for CBG Limited" was CBG's Federal Identification Number, namely "23-2372208." A copy of said corporate certification is annexed hereto as Exhibit "304". A copy of CBG's case information sheet in its bankruptcy case, showing CBG's EIN as "23-2372208", is annexed hereto as Exhibit

"305."

411. PNC knowingly kept CBG's Dime account open after CBG's bankruptcy petition, for the purpose of receiving payments from CBG's purchase money mortgages, for application to CBG's loans in direct contravention to the Order of the Bankruptcy Court, dated March 30, 1992, which mandated that all of CBG's bank accounts be closed. A copy of said order is annexed hereto as Exhibit "306."

412. PNC misrepresented to the Bankruptcy Court, on or about April 30, 1992, that since CBG's bankruptcy petition that PNC no longer received any payments from CBG on its loans. A copy of PNC's motion for relief from automatic stay is annexed hereto as Exhibit "307." Its counsel expressly stated in ¶1 that since CBG's bankruptcy filing "no payments have been made to your secured creditor." Its counsel reiterated in ¶5(b) that "The receivable line increased from a five million dollar line on August 21, 1989, is not performing and in default."

413. In truth and fact, between March 30, 1992 and April 30, 1992, two payments were received from CBG on its receivable line of credit, one for $164,651.00 on April 6, 1992, and the other for $106,764.48 on April 22, 1992, which were wired to PNC from the "First Eastern Bank for CBG Limited" bank account, Account No. 020302070713280 at Dime Savings Bank, F.S.B., by merger with Anchor Savings Bank F.S.B. *See* Exhibit "303-56."

414. A portion of PNC's banking records for CBG's receivable line, showing a running balance history and principal and interest payments made from November 29, 1988 to November 6, 1992, are annexed hereto as Exhibit "308."

415. A memorandum prepared by PNC, dated October 8, 1992, which analyzes and reconciles payments made from

November 11, 1991 to PNC and its two participating banks, is annexed hereto as Exhibit "309."

416. A loan modification authorization document from BSB regarding its participation loan with PNC to CBG's receivable line of credit, dated June 22, 1992, indicating the status of the loan as "Current" on said date, based on said bank's share of payments from CBG, is annexed hereto as Exhibit "310".

417. A quarterly review document from BSB regarding its participation loan with PNC to CBG's receivable line of credit, dated November 6, 1992, indicating "Payments current" on said date, based on said bank's share of payments from CBG, is annexed hereto as Exhibit "311."

418. A summary sheet prepared by C&E Credit showing the amounts received by PNC on CBG's receivable line of credit loan from 1987 until 1997 is annexed hereto as Exhibit "312."

419. In order to carry out the predicate acts stated herein, CBG's monthly filings with the bankruptcy court concealed CBG's income that was being collected by C&E Credit on CBG's behalf from CBG's purchase money mortgages, and applied as payment on CBG's receivable line of credit loan from PNC. A copy of CBG's income statement for the period from April 1, 1992 through April 30, 1992, filed with the bankruptcy court, is annexed hereto as Exhibit "313."

420. After CBG's bankruptcy, in addition to continuing to receive the payment streams on CBG's notes as payment on CBG's receivable line of credit loan, PNC also collected the "interest spread" that belonged to CBG under the loan agreement, i.e., the difference between the amount of interest that the lot owners paid CBG (a higher amount) and the interest that CBG owed PNC on its receivable line (a lower amount). A copy of an internal BSB banking document, prepared by BSB's

loan officer, Glen R. Small, dated April 22, 1992, and titled "history sheet", indicating the bank's decision on the payment streams and interest spread is annexed hereto as Exhibit "314."

421. As a result of PNC's concealment and receipt of the payment streams, and interest spread, from CBG, the Valley of Lakes subdivision, which was controlled by CBG during the relevant time period, was deprived of CBG's income streams, and these assets of the debtor's estate were concealed from all of CBG's creditors.

422. After CBG's bankruptcy, PNC continued to cover-up numerous sham purchases that CBG had used to conceal its insolvency. In particular, PNC was aware that defendant Frank M. Cedrone had arranged numerous sham purchases with its vendors, and others, whereby the "straw man" purchasers would simply pretend to be bona fide purchasers of lots from CBG, simply to generate advances from CBG's receivable line of credit with PNC. A copy of a letter from C&E to Mr. Chuck Stanbaugh of First Eastern Bank, which *inter alia* identifies thirteen "First Payment Defaults", i.e., purchasers who never made a payment on their mortgage, totaling $456,960.00, is annexed hereto as Exhibit "315." A copy of a BSB History Sheet, dated June 15, 1992, discussing *inter alia* said letter, is annexed hereto as Exhibit "316." BSB's loan officer recorded in said History Sheet what PNC's agent, Robert P. Woods of C&E, stated about the first payment defaults, as follows:

> Schedule E are a group of 13 loans which were all booked in the period September-December 1991. They are first payment defaults. In some cases the individuals are contractors or vendors to the developer. Woods indicates that he believes that these contracts were signed with a promise made by the developer that the buyers would never have to make a payment based on his assumption that the project would be refinanced shortly.

423. A copy of a letter, dated May 19, 1993, from one of the listed "first payment defaults", namely, Stephen Malara, to First Eastern Bank, is annexed hereto as Exhibit "317". Mr. Malara expressly informed First Eastern that:

> "Mr. Cedrone asked me to sign for a piece of property to get him money for the short term. This property was either to be given to me as an employee bonus or, if things did not work out, bought out from me within six months. Others were also duped into this scheme to keep floating money—If you like, I can furnish names upon request.
>
> I never put down any money, either as down payment or closing costs.."

424. Despite PNC's knowledge of these sham purchases, PNC never took title from CBG on these notes, in order to foreclose upon the mortgages. A copy of a C&E Trial Balance, dated May 31, 1996, which was attached to the DDI transaction documents, as "Schedule of Lot Paper", is annexed hereto as Exhibit "318." Said Trial Balance shows that these "first payment defaults" continued to be part of CBG's notes, upon which PNC received payments on the receivable line, and that no payments had been made as of said date on the "first payment defaults". *See* Exhibit "318-6."

425. Subsequent to CBG's bankruptcy and PNC's agreement of October 22, 1992 with CBG, which made it possible for CBG to remain in control of the Valley of Lakes, PNC permitted defendant Frank M. Cedrone to arrange for certain of his associates to have their maintenance fees to CBG not collected, based on their association with defendant Frank M. Cedrone. Among other examples are the facts stated in Mr. Malera's letter regarding his non-payment of maintenance fees which is annexed hereto as Exhibit "317."

426. In order to cover up the massive "Land Development Scheme", as well as the actions alleged herein, PNC refrained from taking title to CBG's notes on its purchase money mortgages, altogether, and simply chose to continue to receive CBG's payments on its receivable line of credit loan, until it could find a buyer for all of CBG's assets. A copy of a letter from First Eastern to its participant banks, dated November 18, 1993, is annexed hereto as Exhibit "319."

427. During the relevant time period, PNC collected payments from the mortgagors on CBG's purchase money mortgages in the name of First Eastern Bank, and made numerous representations to class members, for the purpose of misleading them into believing that the bank was the true owner of the notes, and not simply a collateral holder of said notes for CBG. One example of such a representation; namely, a sample letter, dated June 1, 1994, from First Eastern to a mortgagor, is annexed hereto as Exhibit "320." Consequently, the mortgagors did not know that they were actually paying CBG in order for CBG to pay off its loan from PNC.

428. PNC's agents, C&E Credit Consultants and C&E Collections, were paid out of the funds received as payment on CBG's notes to its purchase money mortgages in order to continue the pattern of wrongdoing. Funds were transferred out of the DIME account on a monthly basis for this purpose.

429. In order to cover-up this course of wrongdoing, PNC did not disclose, as part of the DDI transaction, that it was settling causes of action which the participant banks may have had against PNC. As part of the DDI transaction, BSB was paid $100,000 for its interest in CBG's loan, and any causes of action that it may have had against PNC. A copy of a letter from PNC to BSB, dated October 31, 1996, and Termination of Participation Agreement, dated October 30, 1996, is annexed hereto as Exhibit "321." Said documents were not disclosed by

PNC, but were obtained from BSB by plaintiffs pursuant to a subpoena *duces tecum*.

430. PNC conducted the financial transactions, which occurred after the filing of CBG's bankruptcy petition, and which are identified in the DIME bank statements, annexed hereto as Exhibit "303": knowing that the funds represented the proceeds of unlawful activity, and "specified unlawful activity", within the meaning of 18 U.S.C. § 1956, and in order to promote the carrying on of said activities, and to conceal or disguise the nature, source, ownership or control of the proceeds of said activity.

431. As part of conducting the transactions identified herein, and in connection with CBG's bankruptcy case, PNC knowingly and fraudulently concealed the payment streams and interest spread, belonging to the estate of a debtor, CBG, from creditors and the U.S. Trustee; and knowingly and fraudulently received material amounts of funds from the debtor, CBG, after the filing of CBG's bankruptcy petition, with intent to defeat the provisions of title 11.

432. As part of its ordinary course of business in carrying out the transactions, events and occurrences alleged herein, PNC made numerous mailings, some of which are annexed hereto, and uses of interstate wire facilities.

433. Based on these transactions, occurrences and events, PNC committed, as part of the same pattern of racketeering alleged in the original complaint, numerous RICO predicate acts of Bankruptcy Fraud (i.e., fraud connected with a case under title 11), Money Laundering (18 U.S.C. § 1956), Mail Fraud (18 U.S.C. § 1341), and Wire Fraud (18 U.S.C. § 1343).

Dated: May 27, 1998

s/ Roger S. Antao
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